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Lorijean Golichowski Oei

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1988]

THE NEW STANDARD OF REVIEW FOR PRISONERS' RIGHTS:
A "TURNER" FOR THE WORSE?
TURNER v. SAFLEY

[T]he way a society treats those who have transgressed against it is evidence of the essential character of that society.¹

I. INTRODUCTION

The United States Constitution guarantees every citizen certain fundamental rights.² When unlawful governmental action impinges upon constitutional rights, "federal courts [must] discharge their duty to protect" them³ by declaring the action unconstitutional.⁴ Generally, the

1. *Hudson v. Palmer*, 468 U.S. 517, 523-24 (1984).

2. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote and participate in electoral process); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Bates v. Little Rock*, 361 U.S. 516 (1960) (freedom of association); see also J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 11.7 (3d ed. 1986) [hereinafter *CONSTITUTIONAL LAW*] (discussing fundamental rights defined by Supreme Court). Fundamental rights are defined as those which the Supreme Court recognizes as being so essential to individual liberty in our society that they deserve judicial review and protection from acts of the legislative and executive branches of government. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-10 to -12 (1978). Fundamental rights include the fundamental guarantees of the Bill of Rights and six other substantive categories of rights that the Supreme Court has defined as fundamental. *CONSTITUTIONAL LAW*, *supra*, § 11.7. Those fundamental rights as defined by the Court include: 1) freedom of association; 2) the right to interstate travel; 3) the right to vote; 4) the right to fair proceedings before a person is deprived of personal liberty; 5) the right to fairness in criminal proceedings (implicitly recognized by the Supreme Court in a number of cases); and 6) the right to freedom of choice in marital and family decisions. *Id.*

3. *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974) (citing *Johnson v. Avery*, 393 U.S. 483, 486 (1969)) (policy of judicial restraint cannot justify failure to recognize prisoners' valid constitutional claims regardless of context in which they arise). For a discussion of *Martinez*, see *infra* notes 45-57 and accompanying text.

Governmental action that is subject to judicial review includes not only formal legislative enactments but also administrative agency rules and regulations such as those promulgated by state departments of correction. See B. SCHWARTZ, *ADMINISTRATIVE LAW* § 8.1 (2d ed. 1984).

4. *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974). The fourteenth amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Supreme Court has interpreted the equal protection clause as protecting a range of individual rights against legislative encroachment. R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.1-.2 (1986) [hereinafter *SUB-*

courts apply one of several established standards of review to the governmental action in determining its constitutionality.⁵ The standards of review vary in their degree of scrutiny,⁶ and which standard will be applied depends on two factors: (1) the nature of the right in question and (2) whether the challenged action completely abrogates or merely restricts the exercise of an individual's constitutional rights.⁷

In the past two centuries, the American judiciaries' reluctance to hear prisoners' complaints had the practical effect of denying them en-

STANCE AND PROCEDURE]. In order for legislation that impinges on an individual's rights to withstand constitutional challenge, the state must demonstrate a "compelling," an "important" or a "legitimate" state interest, depending on the nature of the right being impinged, in support of the legislation. *Id.* at § 18.3.

5. See J. GOBERT & N. COHEN, *RIGHTS OF PRISONERS* § 10.01 (1981). The Supreme Court has developed three distinct standards of review for equal protection analysis: (1) "strict scrutiny," the highest standard, requires that there be a close connection between the legislation or practice and a compelling state interest, and that the legislation be narrowly drawn to encompass only the recognized state interests, thereby infringing as little as possible on fundamental rights; (2) the intermediate standard requires a substantial relationship to an important, albeit not compelling, state interest; and (3) the lowest standard, known as the "rational relationship" or "rational basis" test requires only that a rational basis exist for the legislative classifications, and that the practice in question logically furthers a legitimate governmental interest. See generally SUBSTANCE AND PROCEDURE, *supra* note 4, § 18.3 (discussing standards of review under equal protection guarantee); L. TRIBE, *supra* note 2, §§ 16-2, -6, -30 (discussing minimum rationality, strict scrutiny and intermediate scrutiny standards of review). For a fuller discussion of these standards of review, see *infra* notes 18-26 and accompanying text. For a discussion of fundamental rights, see *supra* note 2 and accompanying text.

6. See J. GOBERT & N. COHEN, *supra* note 5, § 10.01. Professor Tribe has called the rational basis or "minimum rationality" standard "toothless." L. TRIBE, *supra* note 2, § 16-30, at 1082. Courts employing this standard are extremely deferential to state interests whether or not the facts justifying the state's interest (1) actually exist, (2) would adequately support the regulation if they did exist, or (3) have ever been actually cited in support of the regulation. *Id.* § 16-3, at 996. Professor Tribe suggests that courts may apply an intermediate standard of review in several ways: Courts may require that the state interest served by the restriction be "important" (which is something less than "compelling" under strict scrutiny) rather than merely legitimate. *Id.* § 16-30, at 1082-83. Courts may require that the governmental regulations be substantially related to achieving the state's interests to justify the regulations. *Id.* at 1083. Courts may also refuse to hypothesize the purpose behind the rules and require the legislature to articulate a rationale to support the regulation. *Id.* at 1083-85. Relatedly, courts may reject after-the-fact rationalizations invoked to support a regulation initially adopted without the appropriate rationale in mind. *Id.* at 1085-88. Finally, courts may require that a challenged regulation be altered to permit rebuttal of the presumption of constitutionality in individual cases even if the regulation is not struck down in its entirety. *Id.* at 1088-89. For a discussion and comparison of the degree of scrutiny provided by each standard of review, see *infra* notes 18-26 and accompanying text.

7. See L. TRIBE, *supra* note 2, § 12-20, at 683.

forceable constitutional rights.⁸ More recently, however, courts have extended constitutional protection to prisoners,⁹ though the extent of that protection is uncertain.¹⁰ Another area of uncertainty is the proper standard of review to be used in prisoners' rights cases.¹¹ The Supreme Court's recent decision in *Turner v. Safley*¹² settled this uncertainty by outlining the applicable standard to prisoners' first amendment rights and their fundamental right to marry.¹³ The *Turner* Court held that a

8. See J. GOBERT & N. COHEN, *supra* note 5, § 1.00, at 1. For a brief history of the status of prisoners' rights, see *infra* notes 27-41 and accompanying text.

9. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 575-76 (1974) (constitutional status of prisoner's first, sixth and fourteenth amendment rights is far from clear); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (although both parties to correspondence have interest in communicating with each other, status of prisoner's claim not decided because outsider's claim derived from first and fourteenth amendments is sufficient basis for deciding case independent of what prisoner's rights may be); see also J. GOBERT & N. COHEN, *supra* note 5, § 4.0, at 100 ("The Supreme Court has stated that prison inmates retain those First Amendment rights not inconsistent with their status as prisoners or with the legitimate penological objectives of the correction system, but few decisions have given content to this standard."); cf. *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam) (assuming allegation that prison prohibited prisoner from exercising religious beliefs to be true in motion to dismiss, state violated prisoner's first and fourteenth amendment rights); *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam) (same).

10. See *Turner v. Safley*, 107 S. Ct. 2254 (1987). Justice O'Connor, writing for the majority, stated that "federal courts must take cognizance of the valid constitutional claims of prison inmates. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.* at 2259 (citation omitted); see also *Wolff v. McDonnell*, 418 U.S. 539 (1974) (prisoners entitled to due process protections); *Haines v. Kerner*, 404 U.S. 519 (1972) (same); *Johnson v. Avery*, 393 U.S. 483 (1969) (acknowledging prisoner's right to petition government for redress of grievances); *Lee v. Washington*, 390 U.S. 333 (1968) (prisoners protected against racial discrimination by equal protection clause).

11. See *Turner v. Safley*, 107 S. Ct. 2254 (1987); see also *Procunier v. Martinez*, 416 U.S. 396, 406-07 (1974) (noting disparate standards of review applied by lower courts); J. GOBERT & N. COHEN, *supra* note 5, § 4.00 (noting secure position of first amendment rights of society at large and relative uncertainty of status of prisoners' first amendment rights); Comment, *The Religious Rights of the Incarcerated*, 125 U. PA. L. REV. 812, 837 (1977) (in context of religious free exercise, "[d]ifferent courts apply different tests to essentially similar facts, and occasionally one court applies several different tests to the facts of a single case"). For a discussion of the standards of review applied by the courts of appeals prior to *Turner v. Safley*, see *infra* notes 96-100 and accompanying text. For a discussion of *Turner v. Safley*, see *infra* notes 111-58 and accompanying text.

12. 107 S. Ct. 2254 (1987). For a discussion of the facts, holding and rationale of *Turner*, see *infra* notes 111-58 and accompanying text.

13. *Turner*, 107 S. Ct. at 2261-63. While the Supreme Court applied the *Turner* standard of review to both the first amendment correspondence regulation and the marriage regulation, the Court did not indicate whether it intended the standard to apply only to those specific rights at issue in *Turner*, to all fundamental rights, or to other constitutional rights, for example, the eighth amendment's prohibition against cruel and unusual punishment, etc. See *id.*

This Note will focus on those rights specifically addressed in *Turner*, prisoners' first amendment rights and the right to freedom of choice in marital and

prison regulation that impinges upon prisoners' constitutional rights is constitutionally valid if it is reasonably related to a legitimate penological interest.¹⁴ The *Turner* Court clarified this "reasonable relationship" standard by outlining four factors to be considered in determining the reasonableness of the prison regulation at issue.¹⁵ These factors provide a greater degree of scrutiny than would the more lenient rational basis standard.¹⁶ Thus, the *Turner* Court seems to have adopted a new standard which, at least on its face, would provide for an intermediate standard of review in prisoners' rights cases.¹⁷

This Note will examine the recognition and development of prisoners' rights by the Supreme Court and will highlight the standards utilized by the Court in evaluating challenged prison regulations and practices that allegedly impinge upon prisoners' constitutional rights. Specifically, this Note will address regulations affecting the rights to freedom of speech and privacy. This Note will then examine the *Turner* Court's decision and consider its potential effect upon prisoners' constitutional rights. Finally, this Note will suggest an alternative standard of review that would respect the professional expertise of prison officials while protecting prisoners' rights.

II. BACKGROUND

A. *Standards of Review for Non-Prisoner Cases*

Traditionally, when a government regulation was challenged as a

family decisions. For a discussion of the *Turner* Court's application of the standard of review to the correspondence and marriage regulations, see *infra* notes 135-48 and accompanying text.

14. *Turner*, 107 S. Ct. at 2261. The *Turner* Court stated that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* Legitimate penological interests include security, institutional discipline and rehabilitation. See *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974). For a discussion of the standard employed by the *Turner* Court, see *infra* notes 125-35 and accompanying text.

15. *Turner*, 107 S. Ct. at 2262. The Court stated that four factors should be considered in determining the reasonableness of a prison regulation: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest cited to justify the restriction; (2) whether there are alternative means available to the prisoner of exercising the right; (3) whether accommodating the constitutional right will have an adverse "ripple effect" on guards, inmates and the allocation of prison resources; and (4) whether there are ready alternatives to accommodate the right. *Id.* For a detailed discussion of these considerations, see *infra* notes 125-32 and accompanying text.

16. See *Turner*, 107 S. Ct. at 2261-62. For a discussion of the standards of review generally applied by the Supreme Court, see *infra* notes 18-26 and accompanying text.

17. For a discussion of the intermediate standard of review, see *infra* notes 24-26 and accompanying text. For a discussion of why the *Turner* standard does not, in effect, provide an intermediate level of scrutiny, see *infra* notes 162-88 and accompanying text.

violation of an individual's rights, equal protection analysis proceeded along one of two tiers with courts applying either a strict scrutiny¹⁸ or a rational basis standard of review.¹⁹ Under a strict scrutiny standard, the government must demonstrate a compelling state interest that bears a close connection to the challenged regulation.²⁰ In contrast, under a rational relationship standard, a regulation will be upheld if the reviewing court finds that it rationally furthers a legitimate governmental interest.²¹ Under this highly deferential standard, a state's actions enjoy a

18. Under this two-tier approach, when a statute impinges upon the exercise of a fundamental right or when it affects a suspect class, the reviewing court will subject the regulation to a strict scrutiny standard of review. *CONSTITUTIONAL LAW*, *supra* note 2, § 14.3, at 531. Suspect classes include alienage, race and ancestry. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 185 (1964) (race); *Oyama v. California*, 332 U.S. 633 (1948) (ancestry). For a discussion of fundamental rights, see *supra* note 2.

19. *See SUBSTANCE AND PROCEDURE*, *supra* note 4, § 18.3, at 324-28 (overview of equal protection standards of review).

20. *CONSTITUTIONAL LAW*, *supra* note 2, § 14.3, at 530. A compelling state interest is one of such great magnitude that it justifies the limitation of fundamental constitutional values. *Id.* In examining the legislation, the court will not defer to the decision of the legislative and executive branches, but will independently determine the closeness of the connection between the means and the state interest asserted. *Id.* This standard of review applies where the government regulation in question either classifies persons in terms of their ability to exercise a fundamental right or burdens a suspect class which generally means a group defined in terms of race or national origin. *See L. TRIBE*, *supra* note 2, § 16-6, at 1000.

21. The Supreme Court traditionally uses a "rational relationship" standard in reviewing general social and economic regulations challenged on equal protection grounds. *See, e.g.*, *Schweiker v. Wilson*, 450 U.S. 221, 234-39 (1981) (under rational basis test Court upheld Social Security Act classification reducing Medicaid benefits to persons institutionalized in public mental health care facilities); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 465-66 (1981) (Court reversed state court determination that restriction on plastic milk containers violated equal protection clause); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-76 (1980) (Court upheld retirement act classification under rational basis test allowing double benefits to class of employees); *Harris v. McRae*, 448 U.S. 297, 324-26 (1980) (Hyde Amendment does not violate equal protection because Amendment, in denying funding to indigent women for abortions, satisfies constitutional standard; by encouraging childbirth, Amendment is rationally related to legitimate governmental objective of protecting potential life); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 44-53 (1973) (state system of funding education resulting in substantial interdistrict disparities in per-pupil expenditures due to differences in value of assessable property among districts while imperfect bears rational relationship to legitimate state purpose of assuring basic education); *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) (state regulation setting ceiling on welfare disbursements is rationally supportable as furthering state's legitimate interest in encouraging employment and maintaining equitable balance between welfare families and families of working poor); *McGowan v. Maryland*, 366 U.S. 420, 425-27 (1961) (upheld Maryland law permitting only certain merchants to sell goods on Sundays normally sold by other merchants as well because law is not without rational relation to goal of legislation); *see also J. GOBERT & N. COHEN*, *supra* note 5, § 10.01, at 290.

presumption of reasonableness.²² Furthermore, even where the legislative body may not have articulated the purpose or governmental interest supporting the regulation, the court will uphold the regulation if it can merely hypothesize such a purpose or interest.²³

A number of decisions during the era of the Burger Court added an intermediate standard of review to the traditional two-tier model of equal protection.²⁴ A court applying this intermediate standard determines whether a challenged regulation is "substantially related" to the achievement of an "important governmental objective[]." ²⁵ This standard is most often applied when a statute impinges upon the exercise of an important nonfundamental right, or affects a particular class of people, such as gender-based or illegitimacy classifications which do not rise to the level of suspect classification.²⁶

22. Turkington, *Equal Protection of the Laws in Illinois*, 25 DE PAUL L. REV. 385, 387-88 (1976). Professor Gunther has suggested that a rational basis standard of review has typically meant "minimal scrutiny in theory and virtually none in fact." Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). In fact, since 1937, only one equal protection challenge to economic or social legislation has been successful when a rational basis standard was applied and this case was subsequently overruled. See *Morey v. Doud*, 354 U.S. 457 (1957); *New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam) (overruling *Morey*). After 1937, the Supreme Court declined to engage in any meaningful review of social and economic legislation because of its view that the federal judiciary has no inherent or institutional superiority in determining the rationality of such legislation. CONSTITUTIONAL LAW, *supra* note 2, § 14.3, at 530.

23. Turkington, *supra* note 22, at 388; see, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425-27 (1961) (Court upheld state statute prohibiting sale of certain items on Sunday, hypothesizing that legislature could have reasonably determined that statute was necessary for health of community by enhancing recreational atmosphere); *Allied Stores v. Bowers*, 358 U.S. 522, 528-30 (1959) (exemption from taxation on contents of warehouse for non-resident holding goods for storage only held not irrational because state legislature might have desired to encourage non-residents to construct warehouses).

24. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (invalidated law prohibiting sale of beer with 3.2% alcohol content to males under age 21 but permitting sale to females at age 18); *Pickett v. Brown*, 426 U.S. 1 (1983) (invalidated law requiring paternity suit for child support of illegitimate child be brought before child was two years old where there was no time limit in cases of legitimate children); *Frontier v. Richards*, 411 U.S. 677 (1973) (invalidated law permitting male members of armed forces automatic dependency allowance for their wives while female members had to prove husbands' dependency).

25. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

26. SUBSTANCE AND PROCEDURE, *supra* note 4, at 328; see also Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 345-48 (1949) (discussing reasonable, over-inclusive and under-inclusive classifications); SUBSTANCE AND PROCEDURE, *supra* note 4, § 18.2, at 320-21 (discussing governmental classifications and equal protection).

B. *Constitutional Rights of Prisoners*1. *The Development of Case Law Dealing with Prisoners' Rights*

Historically, courts refused to hear prisoners' complaints or to interfere with the administration of prisons.²⁷ Courts considered prisoners to be "'slave[s] of the State,' having 'not only forfeited [their] liberty, but all [their] personal rights . . .'"²⁸ This judicial refusal of jurisdiction has been coined the "hands-off" doctrine.²⁹ The courts' position of absolute deference to prison officials continued almost completely uninterrupted until the 1960's when a steady stream of cases from both state and federal courts signaled a gradual movement away from the hands-off doctrine.³⁰ This movement was stimulated in part by

27. See Berger, *Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation*, 47 UMKC L. REV. 1, 2-5 (1978) (discussing history of hands-off doctrine in correctional litigation); Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 212-13 (1980) (emphasizing rationales underlying denial of jurisdiction over prisoners' complaints and erosion of this position in lower courts).

28. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 139 (1977) (Marshall, J., dissenting) (quoting *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871)).

29. See Fritch, *Civil Rights of Federal Prison Inmates* 31 (1961) (document prepared for Federal Bureau of Prisons). Specifically, the doctrine provides that "courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506 (1963) (quoting *Banning v. Looney*, 213 F.2d 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954)); see also J. GOBERT & N. COHEN, *supra* note 5, § 1.02. Professors Gobert and Cohen stated that "[t]he hands-off doctrine was never so much a legal doctrine as it was a shorthand way of describing the judiciary's reluctance to become involved in the internal operations of prisons." J. GOBERT & N. COHEN, *supra* note 5, § 1.02, at 7 (footnote omitted).

The "hands-off" courts relied on three primary rationales to support their position of non-intervention: 1) the possibility that intervention would violate the separation of powers doctrine; 2) judicial inexpertise regarding penology; and 3) the fear that intervention by the courts would subvert prison discipline. Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970) (discussion and criticism of these rationales); see also Robbins, *supra* note 27, at 212-13 (same). Additional rationales include the justifications that a hands-off position promotes federalism by precluding federal intervention on behalf of state prisoners, and that it prevents a flood of litigation. See Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795, 797 (1977). A report from the Federal Judicial Center posits that the rationale for the hands-off doctrine was that the convicted prisoner already had "an opportunity to exercise his 'rights' during his day in court." FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS: TENTATIVE REPORT 2 (1976). The report suggests a second rationale that because correctional decisions were primarily therapeutic in nature and were being fashioned to meet rehabilitative goals, it was assumed that such decisions were not a proper subject for judicial attention. *Id.*

30. See Goldfarb & Singer, *supra* note 29, at 183-85; see generally Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962) (out-

Supreme Court decisions which scrutinized and fashioned safeguards

lining state and federal court cases reviewing prisoner complaints). Courts initially entertained access-to-the-courts petitions. See *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951) (habeas corpus proceeding appropriate where prison warden suppressed prisoner's appeal papers pursuant to prison rules); *Ex parte Hull*, 312 U.S. 546 (1941) (affirming prisoner's right of access to court through writ of habeas corpus). Subsequently, courts expanded their jurisdiction to include petitions regarding physical security and minimum conditions necessary to sustain life. See *Davidson v. Cannon*, 474 U.S. 344 (1986) (inmate seriously injured by another inmate when prison officials failed to protect injured inmate despite warning that attack would occur); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (double celling challenged as cruel and unusual punishment); *Bell v. Wolfish*, 441 U.S. 520 (1979) (double celling); *Hutto v. Finney*, 437 U.S. 678 (1978) (conditions of overcrowding, violence, indeterminate time spent in isolation and deficient diet challenged).

During this period, courts also considered cases involving prisoners' civil rights (freedoms of religion, expression and against racial discrimination, as well as rights to privacy, to vote and to defend oneself against criminal charges). See *Block v. Rutherford*, 468 U.S. 576 (1984) (denial of all contact visits and "shake-down" searches of cells challenged as violation of fourteenth amendment and due process rights); *Bell v. Wolfish*, 441 U.S. 520 (1979) (challenge regarding "double celling," prohibition on receipt of hardcover books and packages sent from outside prison, visual body cavity searches after contact visits and "shake-down" searches of cells outside of detainees' presence); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (challenge to rule prohibiting inmates from soliciting other inmates to join prisoners' union, to bar of all union meetings and to officials' refusal to deliver bulk mailings of union materials); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (prohibition of media interviews with specific inmates); *Pell v. Procunier*, 417 U.S. 817 (1974) (same); *Procunier v. Martinez*, 416 U.S. 396 (1974) (mail censorship); *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam) (alleged refusal to allow Muslims to use prison chapel, retaliatory punishment for sharing religious materials and prohibition on correspondence with religious advisor challenged as violation of free exercise of religion); *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam) (alleged denial of privileges because of religious beliefs); *Rios v. Lane*, 812 F.2d 1032 (7th Cir.) (known sympathizer with militant group disciplined for exchanging information containing militant slogans and call numbers of Spanish radio broadcasts), *cert. dismissed*, 107 S. Ct. 3222 (1987); *Tisdale v. Dobbs*, 807 F.2d 734 (8th Cir. 1986) (prison regulation challenged as interfering with free exercise of religion); *Gometz v. Henman*, 807 F.2d 113 (7th Cir. 1986) (mail censorship and refusal to send communication between jailhouse attorney and client-inmate at another institution challenged as violation of client's access to courts); *Udey v. Kastner*, 805 F.2d 1218 (5th Cir. 1986) (refusal of request for special diet as part of religious free exercise); *Martin v. Kelley*, 803 F.2d 236 (6th Cir. 1986) (challenge to mail censorship); *Vester v. Rogers*, 795 F.2d 1179 (4th Cir. 1986) (challenge to prohibition on communication between inmates at different institutions), *cert. denied*, 107 S. Ct. 3189 (1987); *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir. 1985) (prisoners challenged commissioner's refusal to deliver report containing criticisms and complaints about facility to inmates); *St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir. 1980) (Muslim inmate challenged constitutionality of prison's refusal to allow him to wear religious head covering and to provide guard to escort inmate to religious services); *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969) (request for special diet because of religious beliefs); *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir.) (claim of religious persecution and unequal accommodation of various religions), *cert. denied*, 379 U.S. 892 (1964); *Pierce v. LaVallee*, 319 F.2d 844 (2d Cir. 1963) (punishment because of religious beliefs), *cert. denied*, 376 U.S. 918 (1964).

against police and prosecutorial conduct that infringed upon the pre-conviction rights of accused individuals.³¹ Specifically, the Court addressed the fourth amendment exclusion of evidence obtained in an unlawful search or seizure, the fifth amendment protection against self-incrimination and the sixth amendment right to counsel.³² The Court, having thus recognized a greater necessity for safeguarding the constitutional rights of criminal defendants throughout the pre-conviction period, found it inconsistent to subsequently withdraw that protection and concern for constitutional rights because of the defendants' conviction and incarceration.³³ Additionally, this movement away from the hands-off doctrine was facilitated by the Supreme Court's expansive reading of 42 U.S.C. § 1983³⁴ in *Monroe v. Pape*.³⁵ The *Monroe* Court ruled that federal courts had a duty to hear claims of interference by state officials

Courts have also considered a prisoner's right to demand that he be given the benefit of reasonable standards and procedural protections when prison officials' decisions have a significant impact on the prisoner. See *Hudson v. Palmer*, 468 U.S. 517 (1984) (intentional, unauthorized deprivation of property challenged); *Schall v. Martin*, 467 U.S. 253 (1984) (preventive detention of juveniles challenged as violative of due process); *Hewitt v. Helms*, 459 U.S. 460 (1983) (confining prisoner to administrative segregation pending investigation of prison riot challenged as violation of due process rights); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981) (prisoner alleged that pardon board's failure to provide him with written statement of reasons for denying commutation of life sentence violated due process rights); *Hughes v. Rowe*, 449 U.S. 5 (1980) (challenge to procedural irregularities in disciplinary hearing held after inmate confined to segregation); *Meachum v. Fano*, 427 U.S. 215 (1976) (prisoner challenged transfer to prison with less favorable living conditions); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (holding that minimum procedural standards must be satisfied before parole could be revoked); *Haines v. Kerner*, 404 U.S. 59 (1972) (prisoner suit for damages to compensate for injuries and deprivation of rights when inmate was put in solitary confinement); *Sourbeer v. Robinson*, 791 F.2d 1094 (3d Cir. 1986) (prisoner suit alleging that placement in administrative custody violated due process rights), *cert. denied*, 107 S. Ct. 3276 (1987).

31. Goldfarb & Singer, *supra* note 29, at 183.

32. *Id.*; see, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (confessions obtained in violation of fifth amendment procedural safeguards inadmissible at trial); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (confessions obtained after criminal suspect requested but was refused assistance of counsel were in violation of sixth amendment right and therefore inadmissible at trial in state court); *Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by searches and seizures in violation of fourth amendment inadmissible at trial).

33. See Goldfarb & Singer, *supra* note 29, at 184; see also *Turner*, 107 S. Ct. at 2259 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

34. 42 U.S.C. § 1983 (1986). Section 1983 provides:

Every person who, under color of any statute, ordinance, [or] regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

Id.

35. 365 U.S. 167 (1961). In *Monell v. Department of Social Services*, the Court reversed on other grounds its decision in *Monroe*. 436 U.S. 658 (1978).

with federally protected rights.³⁶ The state and federal courts used the expansive language of this decision to consider prisoners' claims even before the Supreme Court expressly extended the protections of section 1983 to prisoners.³⁷

This gradual erosion of the hands-off doctrine thus thrust the courts into the position of protecting prisoners' rights, a position flatly inconsistent with their long-standing deference to prison officials.³⁸ Not only had the courts abandoned a long-standing doctrine, but the absence of relevant precedent provided little to guide them in this newly recognized area of prisoners' rights.³⁹ Because a determination of guilt creates unique constraints on individuals' exercise of fundamental rights, the Supreme Court could not simply apply the fundamental rights analysis of other contexts to the prison context.⁴⁰ While prisoners do not possess all the rights of free citizens, they "retain[] those . . . rights that

36. See *Monroe*, 365 U.S. at 174-80. The Supreme Court delineated the requirements for bringing suit under section 1983 in *Monroe v. Pape*. *Id.* at 183-87. In *Monroe*, 13 Chicago police invaded the Monroe home without a search warrant and forced the family to stand naked in the living room while the police ransacked the house. *Id.* at 169. The police detained Mr. Monroe at the police station on "open" charges for ten hours and interrogated him about a two-day old murder. *Id.*

The Court held that the Monroe family had stated a cause of action against the police officers under section 1983. *Id.* at 187. The Court stated that an "[a]llegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of [section 1983]." *Id.* at 171.

37. See Goldfarb & Singer, *supra* note 29, at 184. In 1964, the Court extended the protections of section 1983 to prisoners. *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam) (prisoner challenged denial of permission to purchase religious publications and denial of privileges afforded other prisoners).

38. See *Procunier v. Martinez*, 416 U.S. 396, 406 (1974) (noting tension between traditional hands-off policy and need to protect prisoners' rights); see also Note, *supra* note 30, at 986-87 (discussing conflict between reluctance of courts to interfere with prison management and rejection of view that prisoner is without rights or remedies).

39. See Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87, 93-94 (1971) (in evaluating constitutionality of prison mail censorship, courts initially employed "bewildering variety of tests" drawn from numerous first amendment doctrines). Prior to recognizing prisoners' rights in general, the Supreme Court heard periodic habeas corpus petitions acknowledging that prisoners retained the constitutional right of access to the courts. See *Ex parte Hull*, 312 U.S. 546 (1941) (prison regulation requiring all writs written by prisoners to be reviewed by prison's "legal advisor" to assure that writs were in proper form held invalid because question whether writ is properly drawn and allegations it must contain were questions for court to determine); see also *Price v. Johnston*, 334 U.S. 266 (1948) (court of appeals has discretionary power to command that prisoner be brought before it so that he may argue own appeal in case involving life or liberty).

40. See J. GOBERT & N. COHEN, *supra* note 5, § 4.01, at 100-02 (noting similarities and differences in prisoners' and general public's interest in expression and noting countervailing considerations in prison context not present outside prisons).

are not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system."⁴¹

Two general formulations of the unique character of prisoners' rights invariably appear in the Supreme Court's decisions in this regard. The first is that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."⁴² The second, a converse of the first, is that an inmate "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."⁴³ Thus, prisoners' rights cases require an approach sensitive to both the nature of prisoners' rights and the constraints of the prison environment.⁴⁴

2. *Recent Supreme Court Prisoners' Rights Decisions*

The Supreme Court first considered the proper standard of review for prisoners' challenges to regulations impinging upon their first amendment rights in *Procunier v. Martinez*.⁴⁵ In *Martinez*, prisoners challenged mail censorship regulations which directed the mailroom staff to censor correspondence that "unduly complained," expressed "inflammatory" views or beliefs, contained "defamatory" material or were "otherwise inappropriate."⁴⁶ The regulations granted the mailroom

41. *Pell v. Procunier*, 417 U.S. 817, 822 (1974). While the *Pell* definition is less than precise as to the scope of prisoners' rights, prisoners do retain rights such as access to the courts and freedom from racial discrimination to a significant degree and rights such as freedom of religion and freedom of speech to a lesser extent. See J. GOBERT & N. COHEN, *supra* note 5, § 1.04, at 13.

42. *Price v. Johnston*, 334 U.S. 266, 285 (1948). The *Price* formulation of prisoners' rights appears frequently in restrictive Supreme Court decisions. Berger, *supra* note 27, at 2 n.10 (citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977); *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

43. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944). Those taking an expansive view of prisoners' rights cite this formulation of prisoners' rights. See Berger, *supra* note 27, at 2 n.10 (citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 139-40 (1977) (Marshall, J., dissenting); *Procunier v. Martinez*, 416 U.S. 396, 422-23 (1974) (Marshall, J., concurring)). Professor Berger notes that "[t]he distinction between these two [formulations] lies in the emphasis on withdrawal of rights upon incarceration in *Price*, and on their retention by inmates in *Coffin*." Berger, *supra* note 27, at 2 n.10.

44. See *Procunier v. Martinez*, 416 U.S. 396, 409-10 (1974) (Court noted importance of environmental characteristics in determining scope of first amendment rights); see also J. GOBERT & N. COHEN, *supra* note 5, § 4.01, at 101 (noting unique environmental factors present in prisons).

45. 416 U.S. 396 (1974); see U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ." *Id.*; see also *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (freedom of speech is among fundamental rights protected by fourteenth amendment from impairment by states).

46. *Martinez*, 416 U.S. at 399-400 (footnote omitted). The rules promulgated by the Director of the California Department of Corrections provided that

staff complete discretion to determine what constituted "inflammatory," "inappropriate" and "defamatory" material.⁴⁷

The *Martinez* Court noted the confusion reigning among the lower courts as to the appropriate standard of review.⁴⁸ Thus, the Court stated that it must resolve the preliminary question of what standard of review to apply when prison regulations restrict the freedom of speech.⁴⁹ The Court, however, did not answer this question but instead emphasized that censorship of personal correspondence not only restricted inmates' rights to free speech, but incidentally restricted the first amendment rights of those outside the prison who wrote to the inmates.⁵⁰ Having found a narrower basis of decision in the rights of outsiders, the Court declined to consider the extent to which an individual's

personal correspondence by prisoners was "a privilege, not a right, and any violation of the rules governing mail privileges . . . may cause suspension of the mail privileges." *Id.* at 399 n.1 (citing Director's Rule 2401). These rules provided the sole criteria by which the mailroom staff were to censor inmate mail. *Id.* at 400.

47. *See id.* at 400. Once a mailroom staff person decided that a letter was objectionable, he could return it to the sender, submit a disciplinary report on the prisoner which could result in suspension of the prisoner's mail privilege, or place a copy of the letter in the prisoner's file to be considered in determining work, housing assignments or parole eligibility. *Id.*

48. *Id.* at 406. The Court noted that the tension between the courts' traditional reluctance to review prisoners' complaints and the conflicting need to protect constitutional rights resulted in a disparity of approaches to such cases. *Id.* Some courts of appeals took a hands-off approach to challenges to mail censorship regulations. *Id.* (citing *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964); *Lee v. Tahash*, 352 F.2d 970 (8th Cir. 1965); *Krupnick v. Crouse*, 366 F.2d 851 (10th Cir. 1966); *Pope v. Daggett*, 350 F.2d 296 (10th Cir. 1965)). The Second Circuit required that censorship be "rational" and "constitutionally acceptable." *Id.* (quoting *Sostre v. McGinnis*, 442 F.2d 178, 199 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972)). The Fifth Circuit demanded that a "compelling state interest" be shown to support censorship. *Id.* at 406-07 (quoting *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968)). The *Martinez* Court also cited a number of federal district court cases applying various intermediate levels of review. *Id.* at 407.

49. *Id.* at 407. The *Martinez* Court noted the need for a uniform standard of review in this regard, cautioning that without one prisoners' first amendment interests received "only haphazard and inconsistent protection." *Id.* Similarly, the Court noted its desire to avoid disservice to prison officials who would be left guessing as to what was constitutionally required of them absent a uniform standard. *Id.* Finally, the Court pointed to the strain on the federal courts because of the "repetitive, piecemeal litigation" encouraged by disparate standards of review. *Id.*

50. *Id.* at 408-09. Thus, the Court rejected the premise that a case such as the one at bar involved any question of the extent of prisoners' first amendment rights. *Id.* The Court reasoned that because both the sender and receiver of a communication had an interest in the correspondence, censorship necessarily impinges on the interests of each party. *Id.* at 409. The Court stated that, therefore, regardless of the status of a prisoner's interest in uncensored mail, the outsider plainly had a first amendment interest whether as a sender or as a recipient of mail. *Id.* at 408-09.

free speech survives incarceration.⁵¹ By expressly basing its decision upon the incidental free speech rights of outsiders, the Court thus side-stepped the very question it framed and was able to apply a heightened level of scrutiny consistent with its decision in other cases.⁵² Specifically, the Court held that the restriction could only be justified if prison officials could demonstrate the regulation furthered an "important or substantial governmental interest unrelated to the suppression of expression."⁵³ Further, the Court required that the officials show that the infringement upon free speech was no greater than necessary to further governmental interests.⁵⁴

Applying this standard to the facts of the case, the *Martinez* Court found that the vague language of the regulations encouraged prison officials and employees who censored mail to apply self-determined standards reflecting their personal prejudices and opinions.⁵⁵ The Court warned that prison officials could not simply use the regulations to deflect criticisms about the prison.⁵⁶ Thus, the *Martinez* Court found that the prison failed to show that the broad restrictions were in any way necessary to further a governmental interest unrelated to the suppres-

51. *Id.* at 408. Robbins considered the Court's rationale and called the case a "Pyrrhic victory, for *Martinez* expressly declined to rule that prisoners had any communication rights, and instead based its holding on the outsiders' first amendment rights As a result the somewhat modified hands-off doctrine and its companion, the withdrawal of privileges doctrine, remained a serious barrier to the expansion of prisoners' rights" Robbins, *supra* note 27, at 214 (footnote omitted).

52. *Martinez*, 416 U.S. at 409-10. The Court looked for guidance in cases dealing generally with incidental restrictions on first amendment rights imposed to further legitimate governmental activities rather than to other prisoners' rights cases. *Id.* at 409. Specifically, the Court discussed two cases involving infringements on first amendment rights in the context of state educational institutions and stressed the special environmental characteristics in each. *Id.* at 409-10 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969); *Healy v. James*, 408 U.S. 169 (1972)). The Court also relied heavily on *United States v. O'Brien* from which it adapted the standard of review that it would apply in its analysis in the case at bar. *Id.* at 410-11 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

53. *Id.* at 413. The Court stated that prison officials could not censor prisoners' mail simply because it was critical of prison administration or factually inaccurate. *Id.* Rather, the Court placed the burden on prison officials to demonstrate that the censorship regulation furthered at least one of the substantial governmental interests of security, order or rehabilitation. *Id.*

54. *Id.* at 414-15. The Court stated that a restriction on correspondence that furthered a substantial governmental interest nonetheless would be invalid if it were unnecessarily broad. *Id.* at 414. The Court was careful to note that latitude should be afforded prison officials in their estimation of the probable consequences of permitting certain speech in the prison. *Id.*

55. *Id.* at 415.

56. *Id.* The Court found that some prison officials took advantage of the wide latitude given them by the regulations to eliminate unwelcome criticism. *Id.*

sion of expression.⁵⁷

Some commentators found the *Martinez* decision "disappointing" because it failed to delineate the scope of prisoners' first amendment rights in those situations which involved the exercise of first amendment freedoms exclusively by prisoners.⁵⁸ Two months later, however, the Supreme Court in *Pell v. Procunier* provided a general standard for prisoners' first amendment rights challenges.⁵⁹

In *Pell*, inmates and members of the media challenged the constitutionality of a regulation which forbade media interviews with *specific* inmates as a violation of their first and fourteenth amendment rights of free speech and freedom of the press.⁶⁰ The Supreme Court balanced the prisoners' first amendment rights against the prison's concerns of security and related administrative matters.⁶¹ The Court stated that institutional objectives promoted by the regulation and the measure of

57. *Id.* The prison defended the lack of guidance provided in the regulation as to the meaning of terms such as "defamatory" and "otherwise inappropriate" by arguing that such regulations were justified by their professional discretion. *Id.* at 415-16. The prison argued that censoring inmates' statements that "magnify grievances" or "unduly complain" promoted rehabilitative goals and prevented "flash riots." *Id.* at 416 (citation omitted). However, the prison officials made no suggestion as to how such statements in prisoners' outgoing mail could stimulate riots within the prison, nor did they demonstrate any causal relationship between suppressing inmates' speech and rehabilitation. *Id.*

58. J. GOBERT & N. COHEN, *supra* note 5, § 4.02, at 104. The authors noted that in situations involving only first amendment rights of prisoners, the *Martinez* holding would not be controlling. *Id.*

59. 417 U.S. 817 (1974).

60. *Id.* at 820-21. Specifically, three professional journalists requested permission to interview inmates Spain, Bly and Guile. *Id.* at 820. These requests were denied pursuant to section 415.071 of the California Department of Corrections Manual which prohibited such interviews. *Id.* The inmates challenged the rule as a violation of their right of free speech under the first and fourteenth amendments. *Id.* at 820-21. The media plaintiffs contended that the rule impaired their ability to gather news and infringed their rights of freedom of the press under the first and fourteenth amendments. *Id.* at 821. The media plaintiffs felt that the interviews they were permitted to conduct with inmates encountered at random would not produce the quality of information that could be obtained through planned, structured interviews with specific inmates. *Id.* at 833. The district court granted the defendants' motion to dismiss the media's claim, concluding that the rule effectively protected whatever rights the press had to interview inmates because the media could still enter the prison and conduct interviews (even confidential ones) with inmates whom they encountered at random notwithstanding the regulation. *Id.* at 821.

61. *Id.* at 822-28. In examining the nature of the inmates' rights, the *Pell* Court noted that the constitutional right of free speech did not necessarily embrace a right to demand that the media listen to one's views. *Id.* at 821-22. Nonetheless, the Court then proceeded to note that in some situations the right of free speech included a right to convey one's opinions to any willing listener. *Id.* at 822.

With the inmates' interest so defined, the Court weighed the prison's legitimate interests in the deterrence of crime, the protective function of isolation in quarantining offenders, rehabilitation and internal institutional security. *Id.* at 822-23.

judicial deference owed to prison officials in their attempts to further those objectives were relevant in determining the validity of the regulation.⁶²

In upholding the regulation, the *Pell* Court found the argument that alternative means of communication were open to the inmates particularly compelling.⁶³ The Court stated that, in light of its prior decisions prohibiting arbitrary censorship on the basis of critical content, "written correspondence afford[ed] inmates an open and substantially unimpeded channel for communication with persons outside the prison including representatives of the news media."⁶⁴ The Court also found that the prison's visitation policy allowed contact with family, friends, clergy and attorneys through whom inmates could communicate with the press.⁶⁵ The *Pell* Court concluded that "[s]o long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved," the regulation fell within the discretion of prison officials.⁶⁶

62. *Id.* at 827. This portion of the opinion evidences the Supreme Court's federalism concerns and its desire to afford state prison officials deference so as not to interfere with the administration of prisons by subverting prison discipline. *Id.* However, lest this deference be seen as a return to a hands-off policy, the Court added the caveat that "[c]ourts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Id.*

63. *Id.* at 823-24. The *Pell* Court recognized that inmate interviews conducted under the regulation, i.e., conducted with randomly encountered inmates, may be qualitatively different than planned interviews with specific inmates, and noted that the "'existence of other alternatives [does not] extinguish[ed] altogether any constitutional interest'" of the inmates. *Id.* at 823 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972)). The Court went on to examine the alternatives available to the inmates, indicating that it would not simply accept the proffered alternatives on their faces but would determine whether they provided meaningful alternative avenues of communication. *Id.* at 823-25.

64. *Id.* at 824. In support of the viability of written correspondence as an alternative means of reaching the media, the *Pell* Court pointed to its decision in *Procunier v. Martinez* where it held that the content of inmates' correspondence was protected from unprincipled censorship aimed at suppressing inmate grievances and complaints. *Id.* at 824 (citing *Procunier v. Martinez*, 416 U.S. 396, 416-18 (1974)). For a discussion of the *Martinez* case, see *supra* notes 45-57 and accompanying text.

65. *Pell*, 417 U.S. at 824-25. The Court noted that visits were allowed without regard to the possible content of the communication between the inmate and the prospective visitor. *Id.* The *Pell* Court concluded that although it would find the availability of such alternatives "unimpressive," if offered to justify governmental restriction of communication among the general public, it would accept them in the situation at bar because of the close relationship between inmates and the state officials who supervise their confinement, and because the "'internal problems of state prisons involve issues . . . peculiarly within state authority and expertise.'" *Id.* at 825-26 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)).

66. *Id.* (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)). The Court rejected the prisoners' claim that restricting their access to the media burdened their first and fourteenth amendment right to petition the government for the

The *Pell* and *Martinez* standards of review are similar in that both require that restrictions on first amendment rights must further important or substantial governmental interests such as security, order or rehabilitation; both stress that the governmental interest must be unrelated to the content of the expression; and both accord prison officials significant deference in determining what practices are needed to further these interests.⁶⁷ However, *Pell* differs from *Martinez* in that it does not discuss the least restrictive alternative means requirement of *Martinez*; nonetheless, *Pell* emphasizes the availability of alternative means of exercising the restricted right.⁶⁸

In *Wolff v. McDonnell*,⁶⁹ the Supreme Court elaborated on and refined the balancing of interests analysis applied in *Pell*.⁷⁰ The *Wolff* Court noted that, in addressing prisoners' complaints, a court must necessarily confront the conflict between prisoners' residual rights and the needs of the institution.⁷¹ Thus, in any prisoners' rights case, the reviewing court must first decide the scope of the prisoners' retained rights, as the Court did in *Wolff*.⁷² Second, the court must determine the

redress of grievances. *Id.* at 828 n.6. The Court reasoned that prisoners had sufficient alternative means of communicating with the press through their visitors as well as through direct, confidential correspondence with any officeholder whether in the executive, legislative or judicial branch as outlined in the state penal code. *Id.* at 829 n.6.

67. See J. GOBERT & N. COHEN, *supra* note 5, § 4.02 (comparing *Martinez* and *Pell* standards).

68. *Id.* The authors suggest that *Pell* does not discuss the least restrictive alternative means requirement because prisoners' first amendment rights alone do not warrant such a limitation. *Id.*

69. 418 U.S. 539 (1974).

70. *Id.* at 555-56. The Court concluded: "In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution" *Id.* at 556. *Wolff* involved challenges to three prison regulations and practices. *Id.* at 542-43. Prisoners alleged that disciplinary proceedings at the prison violated due process; that the legal assistance program was constitutionally inadequate; and that the mail regulations were unconstitutionally restrictive. *Id.* at 543. Specifically, under the mail regulation, all incoming and outgoing mail including attorney-prisoner correspondence was inspected and read. *Id.* at 574. For a discussion of *Pell*, see *supra* notes 59-66 and accompanying text.

71. See *Wolff*, 418 U.S. at 556; see also Note, *Prisoners' Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 166-71 (1986) (discussing *Wolff*). In striking this balance, the Court gave deference to prison officials a major, though not conclusive, role. Note, *supra* at 167. Furthermore, by refusing to accept the regulations as mere matters of prison policy or as presumptively justified by "security needs," the Court rejected the unquestioning deference of the "hands-off" era. *Id.* Finally, by modifying the remedies granted by the lower courts, the Court showed the importance of deference in preserving federalism and in recognizing the expertise of prison administrators. *Id.*

72. See *Wolff*, 418 U.S. at 555-56, 575. In reviewing the mail regulation, the *Wolff* Court noted that prisoners' first amendment rights in the correspondence context had not yet been recognized but under the rationale of *Martinez*, prisoners may be protected from censorship because of the first amendment rights of their correspondents. *Id.* at 575-76 (citing *Procunier v. Martinez*, 416 U.S. 396

nature of the government's interest asserted to justify infringing upon the prisoners' rights.⁷³ Once the court has made these determinations, it must strike a balance between these competing interests, giving weight to the professional expertise of state corrections officials.⁷⁴

The Supreme Court again addressed the question of the proper standard of review in *Jones v. North Carolina Prisoners' Labor Union, Inc.*,⁷⁵ in which the Court took a restrictive view of prisoners' retained rights.⁷⁶ The *Jones* Court's analysis appeared to minimally balance interests by applying a rational basis standard of review which emphasized deference to prison officials and the incompatibility of the exercise of certain rights

(1974)). The Court also considered the scope of prisoners' sixth and fourteenth amendment rights allegedly infringed upon by the state's procedure of opening attorney-inmate mail. *Id.* at 576. The prisoners sought to extend the protection afforded attorney-client mail regarding criminal representation to mail related to civil proceedings as well. *Id.* However, the Court concluded that the sixth amendment only insulated the attorney-client relationship from intrusion in the criminal setting. *Id.* The Court also stated that the fourteenth amendment due process claim based on access to the courts had not been extended beyond protecting the inmate's ability to prepare a petition or complaint. *Id.*

In evaluating the due process claim, the *Wolff* Court traced its prior cases holding that prisoners retained certain constitutional rights including religious freedom, the right of access to the courts, protection from invidious racial discrimination and protection from the deprivation of life, liberty or property without due process. *Id.* at 556 (citations omitted).

73. *Id.* at 561-63. The *Wolff* Court considered the prison's security concern that, without the mail regulation, contraband would be secreted in letters, even in letters from ostensible attorneys. *Id.* at 577. The Court felt that the possibility that contraband would be smuggled into the prison under the guise of attorney mail was a legitimate concern that justified prison officials in opening, but not reading, even attorney-inmate mail. *Id.* The Court reasoned that requiring prison officials to check in each case whether a piece of mail was from an attorney before opening it for inspection would be a nearly impossible administrative task. *Id.* at 576.

Thus, the *Wolff* Court concluded that none of the prisoners' rights were infringed upon by the mail regulation. *Id.* at 576-77. The Court reasoned that since the mail would not be read, the ability to open mail in the presence of inmates could in no way be considered censorship. *Id.* at 577. Nor did the Court feel that the regulation would chill correspondence because the inmate's presence would insure that officials would not read the mail. *Id.* The Court concluded that the regulation might even provide more protection to the prisoner than the constitution required. *Id.*

74. *Id.* at 568. The *Wolff* Court noted that it was "content . . . to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials" responsible for the scope of such inquiries. *Id.* The Court also considered it best to defer to the officials of state prisons because current prison practices were diverse and experimental. *Id.* at 569.

75. 433 U.S. 119 (1977).

76. *Id.* The Court invoked the restrictive formulation of prisoners' rights as set out in *Price v. Johnston*. For a discussion of the *Price v. Johnston* statement regarding the status of prisoners' rights, see *supra* notes 42-43 and accompanying text.

and incarceration.⁷⁷

In *Jones*, prison regulations prohibited inmates from soliciting other inmates to join a prisoners' union and banned all union meetings.⁷⁸ The inmates challenged the prison officials' efforts to prevent the operation of a prisoners' union as a violation of their first and fourteenth amendment rights of free speech, assembly and association.⁷⁹ Prison officials advanced security concerns in support of the restrictions.⁸⁰

The *Jones* Court began its analysis by noting that the district court, in finding for the union, "got off on the wrong foot" by not deferring to prison officials and not recognizing the unique and restrictive environmental factors of the prison setting.⁸¹ The Court emphasized that absent a showing that officials' concerns regarding increased tension and disruption were unreasonable, the burden was not on the prison officials to show affirmatively that the union would be detrimental to correctional objectives such as security and order.⁸² Rather, the Court stated that in the absence of substantial evidence indicating that the officials' response was exaggerated, courts should defer to officials' professional expertise.⁸³

77. See *Jones*, 433 U.S. at 125-26.

78. *Id.* at 122. In addition, the prison refused to deliver packets of union publications mailed in bulk to several inmates who would then be responsible for distributing the materials to other inmates. *Id.* at 122-23. These regulations were promulgated in response to the growth and development of the union which had been incorporated in late 1974 and had attracted approximately 2000 inmate-members by early 1975. *Id.* at 122. The union's stated purposes were to promote the alteration or elimination of prison practices and policies of which it did not approve, to form a labor union to improve working conditions in the prison, and to serve as a vehicle for the presentation and resolution of inmate grievances. *Id.*

79. *Id.* The inmates based their challenge to these regulations on 42 U.S.C. § 1983 (1986). *Id.* at 121. The inmates also contended that they were deprived of equal protection of the laws since other groups such as the Jaycees and Alcoholics Anonymous were permitted to meet and enjoyed bulk mail and other privileges denied the union. *Id.* at 122-23.

80. *Id.* at 126-27. Prison officials testified that an inmate union would increase the existing friction between inmates and prison staff and would be a divisive element between the union inmates and non-union inmates. *Id.* at 127. Furthermore, prison officials argued that it would be subversive to the functioning of the prison, as it could potentially prompt work stoppages, mutinies, riots and chaos. *Id.*

81. *Id.* at 125. The *Jones* Court's strong preference for deferring to the decision of prison administrators is consistent with the Court's decisions in *Pell* and *Martinez*. See J. GOBERT & N. COHEN, *supra* note 5, § 4.02, at 107.

82. *Jones*, 433 U.S. at 128.

83. *Id.* The Court noted that deference to the informed discretion of prison officials permitted officials, rather than the courts, to make the complicated determinations regarding institutional operations. *Id.*

In examining the alleged infringements, the *Jones* Court found that the union members had not been denied individual mail rights, but only bulk mail rights. *Id.* at 130. Thus, the Court concluded that a denial of the cost advantage of bulk mailing did not fundamentally implicate free speech values. *Id.* at

The Court concluded that the ban on inmate solicitation and union meetings was rationally related to the reasonable belief that concerted group activity and solicitation would exacerbate existing problems and create new problems and frictions in prison operations, contrary to the central objectives of prison administration.⁸⁴ Furthermore, the Court

130-31. The Court reasoned that since other means of conveying information were still open to the union, and since there were no first amendment considerations, the bulk mail prohibition was reasonable. *Id.* at 131. The ban on bulk mailing did not extend to individual union mailings sent to individual inmates. *Id.* n.8. The Court noted that since the prison had disavowed any intent to interfere with correspondence between individual inmates and outsiders regarding union matters, it did not have to discuss the issues of the first amendment rights of either outsiders or inmates. *Id.* (citing *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974)).

The *Jones* Court indicated that the solicitation of members for a prisoners' union exceeded the scope of the inmates' first amendment free speech rights in that solicitation involved more than the simple expression by an inmate of his views as to the advantages or disadvantages of a union, but was an invitation to collectively engage in a legitimately proscribed activity. *Id.* at 132-33. The *Jones* Court emphasized that in banning inmate solicitation and organization, the prison had foreclosed only one of several ways in which inmates could voice their complaints to prison officials. *Id.* at 130 n.6. Given the existing institutional grievance procedure, the Court noted that merely because the union's grievance procedure was more desirable did not make the challenged regulations unconstitutional. *Id.* (citing *Martinez*, 416 U.S. at 413; *Greer v. Spock*, 424 U.S. 828, 847 (1976) (Powell, J., concurring)).

The Court stated that if prison officials were entitled to control union activity within the prison, then the incidental prohibition on solicitation necessary to exert such control was not impermissible under the first amendment. *Id.* at 132. As a result, the *Jones* Court concluded that under the facts of the case, the prohibition was not only reasonable but necessary to effectuate the interests of correctional officials. *Id.* at 132 (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

Finally, the *Jones* Court addressed the alleged violation of the inmates' first amendment associational rights. *Id.* at 132. The Court noted that numerous associational rights were inherently inconsistent with confinement, and thus, were necessarily curtailed. *Id.* Specifically, the Court noted that incarceration restricts the freedom of an inmate to associate with others outside the prison as well as with other inmates. *Id.* at 125-26. The Court stated that further curtailment of associational rights was warranted whenever corrections officials determine, without conclusively being proven wrong, that such associations are likely to interfere with order, security, rehabilitation or other legitimate penological interests. *Id.* at 132. The Court reasoned that such deference was owed to professional expertise because officials needed to be able to take preventive steps to thwart a threat to security rather than be confined to merely reactive measures. *Id.* at 132-33.

84. *Id.* at 129. Corrections officials testified that an inmate union would increase the existing tension between inmates and prison personnel and between union inmates and non-union inmates. *Id.* at 126-27. In addition, officials felt that an inmate union would introduce a divisive element into the population and increase the tension caused by the seriously over-crowded conditions. *Id.* at 127. There was also concern that inmate-spokesmen for the union would become power figures who would misuse their influence among other inmates. *Id.* Prison officials expressed concern that once a union was established, even if its activities became overtly subversive, prison administration could do nothing to terminate its existence. *Id.* Officials felt the danger of work stoppages, mutinies,

concluded that the regulation was drafted no more broadly than necessary to prevent the threat posed by such prisoner activities.⁸⁵

Two years later, in *Bell v. Wolfish*,⁸⁶ the Court applied a rational relationship standard to a regulation prohibiting the receipt of hard cover books.⁸⁷ The Court held that the prohibition did not violate the inmates' first amendment rights because it imposed only a limited restriction on receipt of reading materials and was rationally related to the government's objectives.⁸⁸ The *Bell* Court noted that the rule operated in a neutral way without regard to the content of the expression, and that alternative means of obtaining reading materials were not unduly burdensome.⁸⁹ The Court characterized the rule as a "reasonable time,

riots and chaos were too great to allow the establishment of a prisoner union. *Id.*

85. *Id.* at 133. The Court seemed to develop its premise regarding the breadth of the regulations after it reached its conclusion: "If the [prison officials'] views as to the possible detrimental effects of the organizational activities of the Union are reasonable, as we conclude they are, then the regulations are drafted no more broadly than they need be to meet the perceived threat" *Id.* (citing *Procunier v. Martinez*, 416 U.S. 396, 412-16 (1974)).

86. 441 U.S. 520 (1979). Although this case was brought by pre-trial detainees, the Court noted that its ruling was applicable to inmates at the facility as well. *See id.* at 546 n.28.

87. *Id.* at 551. In *Bell*, inmates challenged a regulation that prohibited the receipt of hard cover books unless such books were mailed directly from publishers, bookstores or book clubs as a violation of their first amendment rights. *Id.* at 528, 549. In addition to the challenge to this "publisher-only" rule, "the petition served up a veritable potpourri of complaints that implicated virtually every facet of the institution's conditions and practices." *Id.* at 526-27.

In support of the "publisher-only" rule, prison officials cited security concerns that contraband could be concealed in the bindings of the books and an administrative interest in avoiding the additional staff time required to do a thorough inspection of such items. *Id.* at 549. Officials testified that a proper search of a hardback book would require prison staff to remove both covers and to leaf through every page of all books to ensure that drugs, money, weapons or other contraband were not hidden in the item. *Id.* Officials thus argued that such inspections would take considerable staff time. *Id.*

88. *Id.* at 550-51. Given the ease with which contraband could be smuggled in hardback books and the difficulty in effectively searching them, the *Bell* Court reasoned that there was simply no evidence to indicate that the publisher-only rule was an exaggerated response to legitimate security and administrative concerns. *Id.* at 551.

Commentators suggest that the *Bell* Court could have taken an approach analogous to that of *Martinez* and cast the case as incidentally implicating the first amendment freedom of free world authors to have their work read by prisoners. J. GOBERT & N. COHEN, *supra* note 5, § 4.02, at 108. Gobert and Cohen also suggest that *Bell* implicitly rejects the *Martinez* view that a less restrictive alternative be considered before first amendment rights are curtailed, or at least that the Court is retreating from its view in *Martinez*. *Id.*

89. *Bell*, 441 U.S. at 551. The Court noted that the restriction allowed soft-covered books and magazines to be received from any source and hardback books to be received from publishers, bookstores and book clubs. *Id.* at 552. The Court pointed out that, while it may be more costly to obtain hardback materials under the rule, the loss of a cost advantage did not fundamentally im-

place and manner regulation" that was necessary to further the prison's security interests.⁹⁰ In the absence of an overly broad prohibition, the Court concluded that it should defer to the judgment of prison officials.⁹¹

The rational relationship standard and deferential posture toward prison officials of *Pell*, *Jones* and *Bell* recur in later Supreme Court prisoners' rights decisions.⁹² In *Block v. Rutherford*,⁹³ for example, the Supreme Court clarified the scope of judicial inquiry under *Pell*, stating that, when a court finds many factors counseling against the exercise of the right in question, the court's inquiry should end in deference to the prison officials' expertise.⁹⁴ To continue inquiry into the balance of

pliate free speech values. *Id.* (citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 125, 130-31 (1977)). The Court also noted that reading materials were also available through the prison's inmate library which had approximately 8000 books and which offered newspapers and magazines for sale. *Id.* & n.33.

90. *Id.* at 552 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972)). The Court was also influenced by the fact that the impact of the regulation was limited because a detainee's maximum period of detention averaged approximately 60 days. *Id.* & 524-25 n.3; see also *Adderley v. Florida*, 385 U.S. 39, 46-48 (1966); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941).

91. *Bell*, 441 U.S. at 551. The Court noted that such considerations were "peculiarly within the province" of prison officials' expertise. *Id.* at 547-48. The Court also stressed the importance of deferring to prison officials because of the serious separation of powers issues that would arise if the judicial branch of the government attempted to run the prisons, a function of the executive and legislative branches. *Id.* at 548.

92. See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) (because prison officials should be afforded wide latitude in adopting and implementing prison policies, officials are only obliged to conduct informal, non-adversarial review of inmate's confinement in "administrative segregation"); *Beltran v. Smith*, 458 U.S. 1303, 1305 (1982) (claims of inmate in witness protection program that transfer to another correctional facility would reduce level of safety and security currently enjoyed by inmate at present facility provided insufficient basis for court to interfere with prison officials' discretion to run prison); *Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981) ("[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators.")).

93. 468 U.S. 576 (1984). In *Block*, pretrial detainees challenged the prison's policy of denying all contact visits and its practice of conducting random searches of cells in the absence of the detainees. *Id.* at 578. The detainees filed suit under section 1983. 42 U.S.C. § 1983 (1986). Although this case does not involve first amendment rights, it is illustrative of the Supreme Court's continuing reaffirmation of deference to prison officials even in the face of a total ban on detainees' interests in contact visits. The *Block* Court applied the principles articulated in *Bell v. Wolfish*, a case also brought by pre-trial detainees, in evaluating the constitutionality of conditions of pre-trial detention. *Block*, 468 U.S. at 584. The *Block* Court upheld the blanket prohibition of prison contact visits holding that the constitution did not require contact visits when "experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility." *Id.* at 589.

94. See *id.* The *Block* Court faulted the district court for not ending its inquiry after it found numerous considerations which militated against allowing

competing interests, warned the Court, would result in the reviewing court substituting its view of proper prison administration for that of prison officials.⁹⁵

3. Prisoners' Rights in the Courts of Appeals

Despite the foregoing Supreme Court decisions, which have consistently balanced interests in a rational relationship standard emphasizing deference to the judgment of prison officials, the courts of appeals have applied divergent standards of review.⁹⁶ A number of circuits apply the strict scrutiny standard of *Martinez* despite the fact that the Supreme Court based its opinion in that case on the incidental first amendment rights of the inmates' correspondents.⁹⁷ Other circuits ap-

contact visits. *Id.* Despite its finding, the district court invalidated the prison's practice of prohibiting contact visits. *Id.*

95. *Id.* The *Block* Court found that the district court was able to invalidate the ban on contact visits essentially by disagreeing with prison officials and substituting its judgment for that of prison officials about the extent of the security interests affected and the proper means to further those interests. *Id.* However, the Supreme Court disagreed with the lower courts' conclusion and stated that the valid, rational connection between a ban on contact visits and the prison's interests in the internal security of the facility was too obvious to warrant extended discussion. *Id.* at 586. The Court agreed with prison officials that such visits presented a security risk because contraband could be smuggled into the prison. *Id.* In addition to the concern that contraband would be passed to inmates during a contact visit, the *Block* Court hypothesized that visitors might be taken hostage and used as pawns in escape attempts. *Id.* at 586-87. The Court rejected the lower court's characterization of the total ban as excessive, reasoning that the difficulty of conducting a contact visit program justified the ban. *Id.* at 587. The Court saw difficulties in establishing even a limited contact visit program. *Id.* First, the Court assumed that those detainees allowed contact visits could become part of a conspiracy to help those denied visits to obtain weapons and contraband. *Id.* The Court also recognized the substantial chances that inmates with propensities for violence and escape would be mistakenly approved for visitation. *Id.* The Court emphasized that the brief detention periods in the case at bar made identifying candidates for visitation even more difficult. *Id.* Finally, the Court anticipated that a program allowing only select inmates to have contact visits would breed resentment and tension and, therefore, was presumptively dangerous. *Id.*

96. J. GOBERT & N. COHEN, *supra* note 5, § 4.01, at 101-02.

97. *Rios v. Lane*, 812 F.2d 1032, 1036 (7th Cir.) (state must establish that regulation furthers important or substantial governmental interest and that incidental restriction on first amendment freedoms is no greater than is essential to further governmental interests), *cert. dismissed*, 107 S. Ct. 3222 (1987); *Martin v. Kelley*, 803 F.2d 236, 241 (6th Cir. 1986) (same); *Safley v. Turner*, 777 F.2d 1307, 1311-13 (8th Cir. 1985) (same), *aff'd in part and rev'd in part*, 107 S. Ct. 2254 (1987); *Meadows v. Hopkins*, 713 F.2d 206, 210 (6th Cir. 1983) (same); *Vodicka v. Phelps*, 624 F.2d 569, 570 (5th Cir. 1980) (same); *Guajardo v. Estelle*, 580 F.2d 748, 755 (5th Cir. 1978) (same); *Finney v. Arkansas Bd. of Corrections*, 505 F.2d 194, 211 (8th Cir. 1974) (same); *Nolan v. Fitzpatrick*, 451 F.2d 545, 548 (1st Cir. 1971) (same). *But cf.* *Gometz v. Henman*, 807 F.2d 113, 116 (7th Cir. 1986) (court expressed doubt that proper standard of review is strict scrutiny in case regarding correspondence between inmates at different institutions); *Thorne v. Jones*, 765 F.2d 1270, 1275 (5th Cir. 1985) (security decisions of

ply the Supreme Court's rational relationship standard, and thus, stress deference to the expertise of prison officials.⁹⁸ Two other circuits have applied their own multi-part standards that synthesize the Supreme Court's decisions in *Martinez*, *Pell*, *Jones* and *Bell*.⁹⁹ Finally, the Second Circuit in *Abdul Wali v. Coughlin* articulated yet a fourth approach.¹⁰⁰

In *Abdul Wali*, the Second Circuit formulated a tripartite standard under which the reviewing court considers: (1) the nature of the right being asserted by the inmates; (2) the type of activity in which they seek to engage; and (3) whether the challenged regulation merely limits or totally abridges the exercise of the particular right.¹⁰¹ Part one of the

prison officials are to be reviewed only for reasonableness), *cert. denied*, 475 U.S. 1016 (1986). For a discussion of the *Martinez* standard, see *supra* notes 45-57 and accompanying text.

98. See *Morales v. Schmidt*, 489 F.2d 1335, 1342-43 (7th Cir. 1973) (standard is whether action contemplated bears rational relationship to advancement of justifiable purpose of state which should be closely scrutinized so that review is more than obeisance to officials' expertise); *Sostre v. McGinnis*, 334 F.2d 906, 911 (2d Cir.) (emphasizing that once danger is apprehended and proved, courts should defer to discretion of officials and uphold all measures necessary to meet threatening situation), *cert. denied*, 379 U.S. 892 (1964).

99. The Fourth Circuit, in *Vester v. Rogers*, articulated a two-part standard of review that was developed from *Martinez*, *Pell*, *Jones* and *Bell*. See *Vester v. Rogers*, 795 F.2d 1179 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 3189 (1987). The *Vester* court concluded that "[i]f a penal regulation either intrudes upon the first amendment rights of non-prisoners or constitutes a total denial of an inmate's right to free speech, including any possible alternative means of exercising that right, then the state must satisfy the [*Martinez*] strict scrutiny requirement." *Id.* at 1182. The prison would have the burden of showing both a substantial state interest and no less restrictive alternative exists to effectuate that interest. *Id.* The second part of the standard applies when a regulation operates merely to limit a prisoner's first amendment rights. *Id.* at 1183. In this situation, the judicial deference normally accorded prison officials will, in most instances, defeat a claim of overbreadth. *Id.* In *Vester*, the court would not consider whether the prison had demonstrated an absence of less restrictive alternatives, but rather, considered whether the inmate challenging the regulation had shown by substantial evidence that the prison regulation was an exaggerated response to a valid penological objective. *Id.* For a discussion of *Martinez*, see *supra* notes 45-57 and accompanying text. For a discussion of *Pell*, see *supra* notes 60-66 and accompanying text. For a discussion of *Jones*, see *supra* notes 75-85 and accompanying text. For a discussion of *Bell*, see *supra* notes 86-91 and accompanying text.

The Third Circuit also developed a two-part standard. See *Shabazz v. O'Lone*, 782 F.2d 416 (3d Cir. 1986), *rev'd*, 107 S. Ct. 2400 (1987). Under this standard, prison regulations could be upheld only if the state could prove, "[first] that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and [second] that no reasonable method exists by which [prisoners'] . . . rights can be accommodated without creating bona fide security problems." *Id.* at 420 (footnote omitted).

100. 754 F.2d 1015 (2d Cir. 1985).

101. *Id.* at 1033. In *Abdul Wali*, the inmates sought to receive a report containing criticisms and complaints about conditions at Attica prison. *Id.* at 1022. The Commissioner refused to deliver copies of the report to inmates for fear the report would fuel disturbances and thus threaten security. *Id.* at 1022-23.

standard applies where the exercise of the asserted right is held to be inherently contrary to established penological objectives.¹⁰² If the right does not inhere within the prison context, there can be no invasion of the purported right, and judicial deference should be nearly absolute.¹⁰³ Thus, the court's analysis ends if it determines that prisoners do not retain the particular right.¹⁰⁴

The second part of the standard accords prison officials wide-ranging deference in two instances. The first instance is where the exercise of the right is presumptively dangerous, despite the fact that the restriction abridges a recognized constitutional right.¹⁰⁵ In this situation, prisoners bear the burden of demonstrating that there is no reasonable justification for the regulation.¹⁰⁶ In the second instance, the reviewing court should also afford wide-ranging deference to prison officials where regulations merely prohibit one of a number of available means of exercising protected liberties or define the time, place or manner in which a prisoner may enjoy a right.¹⁰⁷ In the latter instance, the court must defer to official determinations regarding the regulation's necessity and propriety, and therefore avoid the temptation to substitute its judgment for that of experienced professionals.¹⁰⁸

Finally, the third prong of the *Abdul Wali* standard applies where the activity is not presumptively dangerous and where a regulation totally abridges rather than simply limits the exercise of a protected right.¹⁰⁹ In these limited circumstances, prison officials bear the burden of demonstrating that a particular restriction is necessary to further an important governmental interest, and that the limitations on prisoners' retained rights are no greater than necessary to further the governmen-

102. *Id.* at 1033 (citing *Jones*, 433 U.S. at 119).

103. *Id.* For example, the freedom to travel is completely inconsistent with incarceration. See J. GOBERT & N. COHEN, *supra* note 5, § 4.02, at 102. Freedom of association with individuals outside the prison is also completely abridged. See *Jones*, 433 U.S. at 125-26.

104. *Abdul Wali*, 754 F.2d at 1033. The court based this standard on the Supreme Court's decision in *Jones*. *Id.* For a discussion of the *Jones* standard, see *supra* notes 75-85 and accompanying text.

105. *Abdul Wali*, 754 F.2d at 1033 (citing *Block v. Rutherford*, 468 U.S. 576 (1984)). For example, the Supreme Court found contact visits presumptively dangerous in *Block*. 468 U.S. 586-87. In *Abdul Wali*, the court determined that receipt of the prison report was not presumptively dangerous. 754 F.2d at 1034.

106. *Abdul Wali*, 754 F.2d at 1033. The *Abdul Wali* court drew this standard from *Block* in which the Supreme Court upheld a blanket prohibition on contact visits. *Id.* For a discussion of the *Block* standard, see *supra* notes 93-95 and accompanying text.

107. *Abdul Wali*, 754 F.2d at 1033.

108. *Id.* The court drew this part of the standard from *Bell and Pell*. *Id.* For a discussion of the *Bell* standard, see *supra* notes 86-91 and accompanying text. For a discussion of the *Pell* standard, see *supra* notes 59-66 and accompanying text.

109. *Abdul Wali*, 754 F.2d at 1033.

tal interest.¹¹⁰

This lack of uniformity among the courts of appeals prompted the Supreme Court's most recent prisoners' rights decision in *Turner v. Safley*.¹¹¹

C. *Turner v. Safley*

In *Turner*, the Supreme Court found that a less stringent standard than strict scrutiny was appropriate in determining the constitutionality of prison rules affecting the fundamental rights of prisoners.¹¹² The inmates in *Turner* challenged two prison regulations. The first regulation permitted correspondence between immediate family members who were inmates at different Missouri prisons and between other inmates "concerning legal matters," but did not permit other inmate correspondence unless the inmate's classification-treatment team deemed it in the best interests of the inmate.¹¹³ The second regulation permitted an inmate to marry only with the permission of the prison superintendent.¹¹⁴ Permission was given only when there were "compelling reasons" for the marriage.¹¹⁵ In practice, only a pregnancy or an illegitimate birth were considered "compelling."¹¹⁶

The district court found both regulations unconstitutional.¹¹⁷ The court applied the strict scrutiny standard articulated in *Martinez* and concluded that the correspondence regulation was unnecessarily broad be-

110. *Id.* (citing *Martinez*, 416 U.S. at 413). For a discussion of *Martinez*, see *supra* notes 45-57 and accompanying text.

111. 107 S. Ct. 2254 (1987).

112. *Id.* at 2257. The Court explained that if the daily judgments of prison officials were subject to an "inflexible strict scrutiny standard," officials' ability "to anticipate security problems" and "to adopt innovative solutions to the intractable problems of prison administration would be seriously hindered." *Id.* at 2262. The Court felt that such a rule would potentially subject every administrative judgment to "the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Id.* Finally, the Court reasoned that such a rule would inevitably and unnecessarily perpetuate the involvement of the federal courts in prison administration. *Id.* (citing *Martinez*, 416 U.S. at 407). For a discussion of a strict scrutiny standard of review, see *supra* notes 18-20 and accompanying text.

113. 107 S. Ct. at 2258. In practice, however, the effect of the regulation was to completely prohibit correspondence between non-related inmates. *Id.* The decision whether to permit inmates to correspond was based on team members' evaluation of progress reports, conduct violations and psychological reports. *Id.*

114. *Id.*

115. *Id.* The prison adopted the challenged marriage regulation while the mail regulation case was pending in the lower federal courts. *Id.* The previous regulation regarding marriage did not obligate officials to facilitate inmate marriages, or specifically authorize the superintendent to prohibit inmate marriages. *Id.*

116. *Id.*

117. *Id.*

cause prison officials could cope with security problems through less restrictive means such as scanning suspect mail.¹¹⁸ The court also found the marriage regulation an unconstitutional infringement of the fundamental right to marry because it was more restrictive than reasonably necessary to further the state's interests in security and rehabilitation.¹¹⁹

On appeal, the Eighth Circuit held that the district court had properly applied the *Martinez* strict scrutiny standard and stated that it could uphold the correspondence regulation only if it furthered an important or substantial governmental interest unrelated to the suppression of expression and was no greater than necessary to protect the government's interest.¹²⁰ The court of appeals stated that inspecting prisoners' mail would be a less restrictive means of protecting the government's interest in maintaining institutional security.¹²¹ Furthermore, the court concluded that the marriage regulation could not be supported by the correctional system's asserted interests of rehabilitation and security: rehabilitation interests could be better met through the alternative of counseling and security concerns about violent "love triangles" were unfounded, since rivalries were just as likely to occur with a formal marriage ceremony as without one.¹²²

The United States Supreme Court in *Turner* began its analysis by stating its task was "to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [t]o the need to protect constitutional rights.'"¹²³ The Court, after reviewing its prior prisoners' rights decisions, stated that it had not applied a standard of heightened scrutiny in any of its prior cases, but instead had inquired "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an

118. *Id.* The district court also held that the mail regulation was applied arbitrarily and capriciously. *Id.* For a discussion of the standard applied in *Martinez*, see *supra* notes 45-57 and accompanying text.

119. *Turner*, 107 S. Ct. at 2258.

120. *Id.* Specifically, prison officials expressed concern that by permitting inmate-to-inmate correspondence, the safety of inmates sent to the facility for protective custody would be jeopardized. *Id.* at 2263. Officials also testified that mail sent between institutions could be used to communicate escape plans and to arrange assaults. *Id.* Finally, prison witnesses stated that prohibiting communication between inmates in combination with transferring inmates to different institutions helped to combat the growing problems of gangs in Missouri prisons. *Id.*

121. *Id.*

122. *Id.* Barring evidence that the relationship was or would become abusive, the court of appeals found the connection between an inmate's marriage and the subsequent commission of a crime too tenuous to justify denying that right. *Id.*

123. *Id.* (quoting *Martinez*, 416 U.S. at 406).

'exaggerated response' to those concerns."¹²⁴

The Court then clarified the appropriate standard of review holding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."¹²⁵ The Court also outlined a number of factors relevant in determining the reasonableness of the regulation. First, there must be a rational connection between the prison regulation and the legitimate governmental interest advanced to justify it.¹²⁶ The Court elaborated that the logical connection could not be so attenuated as to make the policy arbitrary or irrational.¹²⁷ The Court also stated that the governmental objective had to be legitimate and neutral.¹²⁸ The Court found a second consideration going to the reasonableness of the regulation was the availability of alternative means by which the inmates could exercise the right.¹²⁹ The Court noted that where alternative avenues remain available for the exercise of an asserted right, courts should be especially deferential to the professional judgment of prison officials.¹³⁰ A third consideration discussed by the *Turner* Court was the impact that accommodating the asserted constitutional right would have on other inmates and guards and upon the allocation of prison resources.¹³¹ Finally, the Court stated that the absence of alternative means for accommodating a prisoner's rights evidenced the reasonableness of the prison regulation.¹³²

124. *Id.* at 2260-61. The Court discussed *Martinez*, *Pell*, *Jones*, *Bell* and *Block* and highlighted factors that it found important in each. *Id.* at 2259-61.

125. *Id.* at 2261. Security, institutional discipline and rehabilitation are generally considered legitimate penological objectives. *See Pell*, 417 U.S. at 822-23.

126. *Turner*, 107 S. Ct. at 2262 (citing *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

127. *Id.*

128. *Id.* The Court stressed the importance of the regulation operating in a neutral fashion without regard to the content of the expression. *Id.*; *see also Bell v. Wolfish*, 441 U.S. 520, 551 (1979) (lack of content-based restriction factor in Court's analysis); *Pell*, 417 U.S. at 828 (noting so long as restriction operates neutrally without regard to content of expression, regulation falls within appropriate rules and regulations to which prisoners are necessarily subject).

129. 107 S. Ct. at 2262. Simply because alternative avenues are more desirable than the restricted ones, this does not make the restriction unconstitutional. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 n.6 (1977). Nor is the loss of a cost advantage in the restricted means of exercising a right a sufficient ground for invalidating a regulation. *See id.* at 130-31.

130. *Turner*, 107 S. Ct. at 2262 (citing *Pell*, 417 U.S. at 827).

131. *Id.* The Court noted that in the closed institutional setting, few accommodations will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving order and security. *Id.* Courts should defer to the discretion of prison administrators if accommodating the prisoner's right will significantly affect other inmates or prison staff. *Id.*

132. *Id.* (citing *Block v. Rutherford*, 468 U.S. 576, 587 (1984)). The Court noted that the existence of obvious, easy alternatives may be evidence that the regulation is unreasonable, and an exaggerated response to prison concerns. *Id.*

The *Turner* Court noted that the standard of review was not a " 'least restrictive alternative test.' " ¹³³ If an inmate could point to an alternative enabling him to exercise his rights at a *de minimis* cost to valid penological interests, the majority stated, a court could properly consider that as evidence of the reasonableness of the regulation. ¹³⁴ The Court further noted that prison officials did not have to disprove every conceivable alternative to demonstrate the reasonableness of the regulation or practice. ¹³⁵

Addressing the new standard to the facts of the case, the *Turner* Court held that the first factor was satisfied because there existed a logical connection between the correspondence regulation and the prison's security interest in preventing inmates from potentially using the mails as a vehicle to communicate escape plans, to arrange assaults and other violent acts and to facilitate prison gang activities. ¹³⁶ Moreover, the Court found that the second factor was met since the regulation did not completely abridge the prisoner's freedom of expression, but merely barred communication with a limited class of people with whom officials had reasonable cause to be concerned. ¹³⁷

Addressing the third factor, the *Turner* Court reviewed the impact the exercise of the inmates' rights would have on other inmates and per-

133. *Id.*

134. *Id.* If an inmate can demonstrate such an alternative, this is only evidence that the regulation may be an " 'exaggerated response' to prison concerns." *Id.*

135. *Id.* Note that the standard of review the *Turner* Court outlined is stricter than a minimum rationality, rational relationship test. See *id.* at 2262. Had the Court merely applied a rational relationship standard, its analysis would have ended when it concluded that the regulations reasonably furthered the prison's rehabilitation and security interests. For a discussion of the rational relationship test, see *supra* notes 21-23 and accompanying text. However, the Court's standard, at least on its face, required more than a "valid, rational connection" between the challenged regulation and the legitimate governmental interest. 107 S. Ct. at 2262 (quoting *Block*, 468 U.S. at 586). Three additional factors weigh into a court's analysis under the *Turner* standard. By including these factors, the Court has seemingly intensified its level of scrutiny beyond minimum rationality to intermediate scrutiny. For a discussion of minimum rationality and intermediate scrutiny levels of review, see *supra* notes 21-26 and accompanying text. For a further analysis of the *Turner* standard, see *infra* notes 158-88 and accompanying text.

136. *Turner*, 107 S. Ct. at 2226-63. The Court reasoned that communication between inmates was a "potential spur" to criminal behavior and pointed to the fact that contact between felons is frequently prohibited even after inmates are released on parole. *Id.* (citing 28 C.F.R. § 2.40(a)(10) (1986) (federal parole made contingent on non-association with known criminals, unless permitted by parole officer)). The Court also noted that separating and isolating gang members was a frequently used strategy in controlling gang activity and that this policy was logically furthered by the ban on inmate-to-inmate correspondence. *Id.* (citing G. Camp & C. Camp, U.S. Dep't of Justice, *Prison Gangs: Their Extent, Nature and Impact on Prisons* 64-65 (1985)).

137. *Id.*

sonnel.¹³⁸ The Court accepted the prison officials' professional opinion that correspondence between inmates of different institutions encouraged the development of informal organizations which threatened institutional safety and internal security.¹³⁹ The Court concluded in this regard that "[w]here exercise of a right requires this kind of trade-off, we think that the choice made by corrections officials—which is, after all, a judgment 'peculiarly within [their] province and professional expertise,' should not be lightly set aside by the courts."¹⁴⁰

Finally, the *Turner* Court considered the fourth factor and found that no ready alternatives to the correspondence regulation were advanced by the respondent prisoners.¹⁴¹ The Court noted that the restriction appeared to reasonably preserve order and security in light of substantially similar practices utilized by other state correctional systems and the Federal Bureau of Prisons.¹⁴² The Court then rejected as inadequate and overly burdensome upon prison staff the prisoners' sole proposed alternative of monitoring inmate correspondence for dangerous messages.¹⁴³

After considering the prison regulation in light of the four factors, the Court concluded that the prohibition on correspondence was reasonably related to valid correctional goals, was content neutral, logically advanced the goals of security and safety and was not an exaggerated

138. *Id.*

139. *Id.* The Supreme Court specifically noted Missouri prison officials' increasing problems associated with prison gang activity. *Id.* The Court further noted that the correspondence rights at issue here were very much like the organizational activities at issue in *Jones*, in that they could only be exercised at the cost of significantly less liberty and safety for the other inmates and prison staff. *Id.* The Court indicated that the potential for a "ripple effect" impacting other institutions' inmates and staff would be even broader than in *Jones* if prisoners were allowed to exercise their correspondence rights. *Id.*

140. *Id.* (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

141. *Id.* The only alternative that the prisoners suggested was that prison officials could monitor inmate-to-inmate correspondence. *Id.* at 2263-64.

142. *Id.* at 2263.

143. *Id.* at 2264. The Court stated: "Prison officials testified it would be impossible to read every piece of inmate-to-inmate correspondence." *Id.* The prison never permitted inmate-to-inmate correspondence, and, therefore, it had no idea what the volume of such mail would be but simply speculated that all 8000 inmates would write. *Id.* at 2272 (Stevens, J., concurring in part, dissenting in part). Nevertheless, the Court concluded that the requisite monitoring "clearly would impose more than a *de minimis* cost on the pursuit of legitimate correctional goals." *Id.* at 2264. The Court concluded that it would be impossible for the mailroom staff to read every piece of inmate-to-inmate correspondence, and that even if they could read every piece, there would still be a great chance of missing dangerous messages written in jargon or code, making such a practice impractical. *Id.* The Court stated that the risk of missing dangerous communication together with the administrative burden that the monitoring inmate-to-inmate correspondence would impose supported the officials' judgment that this was not a reasonable alternative. *Id.*

response to security concerns.¹⁴⁴

The *Turner* Court next considered the marriage regulation.¹⁴⁵ Recognizing the decision to marry as a fundamental right,¹⁴⁶ the Court applied the same standard of review to this regulation as it applied to the correspondence regulation.¹⁴⁷ In response to the prison administra-

144. *Id.* In a footnote, the Court distinguished the standard it applied in the case at bar from the district court's. *Id.* at 2264 n.**. The Court stated that the standards each court applied were not only semantically different, but the district court erroneously applied the least restrictive alternative factor of *Martinez* in concluding that the correspondence regulation was unnecessarily sweeping. *Id.* (citing *Martinez*, 416 U.S. at 413-14). The Court dismissed the district court's findings of fact explaining that they were based on the court's erroneous use of a least restrictive means standard and, therefore, were largely irrelevant for the purposes of the proper inquiry which was "whether the regulation was reasonably related to a legitimate governmental interest." *Id.* at n.**.

145. *Id.* at 2265. The regulation prohibited both marriages between inmates and marriages between an inmate and a civilian unless there were compelling circumstances, such as a pregnancy or illegitimate birth. *Id.*

146. *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374 (1976) (right to marry is of fundamental importance)); see also *Loving v. Virginia*, 388 U.S. 1 (1967) (freedom to marry has long been recognized as vital personal right essential to orderly pursuit of happiness); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (marriage is fundamental right).

147. 107 S. Ct. at 2266. The Court applied the same standard of review to both regulations notwithstanding the fact that the correspondence regulation, in effect, imposed a total prohibition on prisoners' correspondence rights while the marriage regulation imposed a severe, albeit not total, prohibition on inmate marriages. See *id.* For a discussion of the Court's refusal to use a hierarchy of standards of review corresponding to the severity of the imposition on prisoners' exercise of their rights, see *infra* notes 178-81 and accompanying text.

The Court hinted that the marital regulation's burden upon inmate-civilian marriages might support applying the *Martinez* standard. 107 S. Ct. at 2266. However, the Court never directly addressed this possibility because it concluded that the regulation could not withstand scrutiny even under the more lenient reasonable relationship standard. *Id.* For a discussion of the *Martinez* standard, see *supra* notes 45-57 and accompanying text.

The *Turner* Court did not indicate whether its standard was to be applied to all fundamental rights or only to first amendment correspondence rights and to the right to make decisions about marriage and family; however, subsequently, the Supreme Court applied the *Turner* standard to a first amendment religious free exercise claim. See *O'Lone v. Shabazz*, 107 S. Ct. 2400 (1987); see also *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (applied *Turner* standard to strike down regulation requiring pregnant inmates to obtain court-ordered release before they could receive elective, non-therapeutic abortion as unconstitutional infringement upon right to privacy); *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987) (applied *Turner* in reviewing inmate's first amendment challenge to jail policy of rejecting unprivileged mail and restricting access to hardbound legal volumes and concluded challenge was without merit because all *Turner* required was reasonable relationship between policy and government interest in security); *Deer v. Carlson*, 831 F.2d 1525 (9th Cir. 1987) (applied *Turner* to uphold regulation prohibiting inmates from wearing all headgear even religious head coverings, in dining hall as rational response to legitimate concerns about sanitation and discipline); *Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987) (applied *Turner* to uphold prison's practice of cancelling prayer services because of scheduling conflicts or because of unavailabil-

tion's justification of the regulation on security and rehabilitation grounds, the *Turner* Court held the regulation unconstitutional on the basis that it was not reasonably related to the penological interest of security, but instead was an exaggerated response to this concern.¹⁴⁸ The Court concluded that there were alternative methods readily available to prison officials to accommodate the right to marry that imposed a minimal burden on security.¹⁴⁹

ity of Muslim chaplain and of impeding ability of inmates to obtain work releases to attend religious service); *McCabe v. Arave*, 827 F.2d 634 (9th Cir. 1987) (applied *Turner* standard to uphold prison's refusal of permission to conduct group study and worship of religion advocating racial hatred, revenge and violence as logically related to safety and security interests; however, failure to provide storage for religious literature is unconstitutional, but prison may censor literature to excise parts advocating violence, illegal activity and inflammatory racial views likely to incite violence); *Brooks v. Andolina*, 826 F.2d 1266 (3d Cir. 1987) (court stated that *Turner* simply upheld regulation prohibiting inmate-to-inmate correspondence in light of security concerns and did not support prison's action in disciplining inmate for critical content of letter sent to outsider); *Abbott v. Meese*, 824 F.2d 1166 (D.C. Cir. 1987) (applied *Turner* standard to regulation restricting inmate-to-inmate correspondence but applied *Martinez* strict scrutiny standard to first amendment practice of rejecting certain publications on ground that regulation infringes rights of publishers as well as inmates' rights); *Rodriguez v. James*, 823 F.2d 8 (2d Cir. 1987) (applied *Turner* standard to uphold regulation requiring business mail of inmates to be submitted unsealed for inspection and approval of any obligation of funds as reasonably related to goal of preventing inmates from defrauding merchants or incurring excessive debt).

148. *Turner*, 107 S. Ct. at 2266. The justification advanced by the prison officials for prohibiting both civilian-inmate and inmate-to-inmate marriages was twofold. *Id.* First, prison officials were concerned about the possibility of violent "love triangles" leading to confrontations between inmates. *Id.* Second, the prison administration asserted a rehabilitative justification of encouraging self-reliance among female inmates who were abused at home or who exhibited a detrimental overdependence on males. *Id.* Prison officials testified that often this abuse or dependence was related to a woman's criminal activity. *Id.* Prison Superintendent Turner cited his experience with "several ill-advised marriage requests from female inmates" in that regard. *Id.* The superintendent felt that the aim in rehabilitating these women was to foster self-reliance and independence and that prohibiting marriage furthered this goal. *Id.* The Court, however, did not defer to his professional expertise. *Id.* The Court noted that legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval, but the restrictions in this case were excessive. *Id.* The Court stated that nothing in the record suggested that the regulation was viewed as preventing potentially violent "love triangles." *Id.* The Court thus found no logical connection between the marriage restriction and the formation of love triangles, reasoning that such inmate rivalries were just as likely to occur without a formal marriage ceremony as with one. *Id.*

149. *Id.* One such alternative was to generally permit inmate marriages, but to reserve to prison officials the power to prohibit a marriage if officials found that the particular marriage would pose a threat to security, order or public safety. *Id.* The Court stated that nowhere in the record did prison officials testify that such an alternative would not satisfy their security concerns. *Id.* The Court indicated that the regulation which mandated refusal of a marriage request, absent a compelling reason to allow the marriage, was overly broad, especially in light of testimony that officials had experienced no problems with male

Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, dissented in part and concurred in part, arguing that the standard employed by the majority permitted disregard for prisoners' constitutional rights.¹⁵⁰ Justice Stevens found "not . . . much difference" between the standard applied by the district court and the court of appeals—whether the challenged regulation was "needlessly broad"—and that applied by the *Turner* majority—whether the regulation was "reasonably related to legitimate penological interests" and was not an "exaggerated response" to such concerns.¹⁵¹ Specifically, Justice Stevens stated that the majority's requirement that there merely be a "logical connection" between the regulation and some legitimate interest was "virtually meaningless."¹⁵² Justice Stevens further condemned the majority's conclusion regarding the correspondence regulation as the product of a "newly minted" standard of review as well as of "plainly

inmates' marriages in the past. *Id.* As to the rehabilitative justifications, the Court stated that it simply could not account for the ban on inmate-civilian marriages. *Id.* The Court emphasized that, especially in the case an inmate and a civilian, "the decision to marry . . . [was] a completely private one." *Id.* at 2266. Upon examination, the Court found the rehabilitative objective of fostering self-reliance "suspect" since the over-dependency problem asserted by prison officials was a factor in only a limited number of cases. *Id.* at 2267. Further, the regulation was seen as excessively paternalistic in scrutinizing the marriage requests of all female inmates. *Id.*

150. *Id.* at 2267 (Stevens, J., concurring in part, dissenting in part). Justice Stevens, however, stated that he was able to concur in the majority's invalidation of the marriage regulation because this result did not require rejection of a standard of review more demanding than the one articulated by the majority. *Id.* at 2268 (Stevens, J., concurring in part, dissenting in part). For a discussion of the standard articulated by the *Turner* majority, see *infra* notes 159-88 and accompanying text.

151. 107 S. Ct. at 2267 (Stevens, J., concurring in part, dissenting in part). Justice Stevens commented that determining the "proper" standard of review in such a case would not magically make the Court's task of deciding the case any easier. *Id.* at 2268 (Stevens, J., concurring in part, dissenting in part). Justice Stevens remarked: "How a court describes its standard of review when a prison regulation infringes fundamental constitutional rights often has far less consequence for the inmates than the actual showing that the court demands of the State in order to uphold the regulation. This case provides a prime example." *Id.* at 2267 (Stevens, J., concurring in part, dissenting in part). Justice Stevens fully agreed with the lower courts' conclusion that the total ban on inmate-to-inmate correspondence violated the first amendment given no showing by prison officials that they could not anticipate and avoid any security problems that may arise from allowing such correspondence. *Id.* at 2270 (Stevens, J., concurring in part, dissenting in part).

152. *Id.* at 2267 (Stevens, J., concurring in part, dissenting in part). Justice Stevens stated:

Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners

Id. at 2267-68 (Stevens, J., concurring in part, dissenting in part).

improper . . . encroachment into the fact-finding domain of the District Court."¹⁵³

Justice Stevens found the majority's treatment of each regulation under the standard "striking and puzzling."¹⁵⁴ While the majority found that inmates were not totally deprived of all means of expression under the correspondence regulation, the dissent considered this irrelevant to the issue of whether the restrictions enforced were unnecessarily broad.¹⁵⁵ Justice Stevens reasoned that if the majority had applied the same rationale to the marriage regulation, i.e., that the regulation did not totally prevent inmates from marrying, as it had to the correspondence regulation, then the majority would have been forced to uphold the marriage regulation on the basis that it could have been even more restrictive.¹⁵⁶ Justice Stevens likewise rejected the majority's contention that it would be impossible for officials to scan inmate-to-inmate correspondence, finding the evidence in the record insufficient to support

153. *Id.* at 2268 (Stevens, J., concurring in part, dissenting in part) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986)). Justice Stevens accused the majority of factfinding and sifting the testimony to uphold the correspondence regulation. *Id.* (Stevens, J., concurring in part, dissenting in part). Specifically, Justice Stevens pointed out that the majority cited both the trial transcript and the *amicus curiae* brief of the state of Texas, but selectively ignored the district court's findings of fact. *Id.* at 2268 n.2 (Stevens, J., concurring in part, dissenting in part). Under Rule 52(a) of the Federal Rules of Civil Procedure, the *Turner* Court was bound by all of the district court's findings since they were not clearly erroneous. *Id.* (Stevens, J., concurring in part, dissenting in part). Nevertheless, Justice Stevens noted, the majority relied on the district court's finding that the marriage regulation was excessively paternalistic but rejected the court's findings regarding the correspondence regulation which were not clearly erroneous. *Id.* at 2274 (Stevens, J., concurring in part, dissenting in part). Similarly, in the marriage context, the majority rejected expert speculation about security problems associated with "love triangles," yet in the correspondence context, expert speculation about "potential gang problems" and the possible use of codes and jargon received "virtually total deference." *Id.* (Stevens, J., concurring in part, dissenting in part). Justice Stevens also noted that "while the Court correctly dismisses as a defense to the marriage rule the speculation that the inmate's spouse, once released from incarceration, would attempt to aid the inmate in escaping, the Court grants virtually total credence to similar speculation about escape plans concealed in letters" from one inmate to another. *Id.* (Stevens, J., concurring in part, dissenting in part) (footnote omitted).

154. *Id.* (Stevens, J., concurring in part, dissenting in part) (footnote omitted). The dissent noted:

The Court's bifurcated treatment of the mail and marriage regulations leads to the absurd result that an inmate at [the prison] may marry another inmate, but may not carry on the courtship leading to the marriage by corresponding with him or her beforehand because he or she would not then be an "immediate family member."

Id. at 2274 n.15 (Stevens, J., concurring in part, dissenting in part).

155. *Id.* at 2272 (Stevens, J., concurring in part, dissenting in part). The fact that an inmate could correspond with friends who are not incarcerated does not make the regulation less than a total ban on correspondence between inmates and as such is irrelevant to the question whether the restrictions were unnecessarily broad. *See id.* (Stevens, J., concurring in part, dissenting in part).

156. *Id.* at 2272 (Stevens, J., concurring in part, dissenting in part).

such a finding of impossibility.¹⁵⁷ As a result, Justice Stevens called the regulation a "blanket prohibition" and an "'excessive response'" to any legitimate security concern.¹⁵⁸

III. ANALYSIS

It is submitted that the Supreme Court's "newly minted" standard is hardly new.¹⁵⁹ The *Turner* majority said as much when it stated that *Pell*, *Jones* and *Bell* had probably already determined the proper standard of review for prisoners' rights.¹⁶⁰ In fact, the Court made the same rational relationship test it had applied in those prior cases a factor in the *Turner* standard, and merely supplemented the analysis by outlining three other factors courts should consider in determining the constitutionality of a challenged prison regulation.¹⁶¹

157. *Id.* (Stevens, J., concurring in part, dissenting in part). Justice Stevens stated: "No such finding of impossibility was made by the District Court, nor would it be supported by any of the findings that it did make." *Id.* (Stevens, J., concurring in part, dissenting in part). In support, Justice Stevens quoted a district court finding, ignored by the majority, that the staff at the prison had been able to scan and control outgoing and incoming mail, including inmate-to-inmate correspondence. *Id.* (Stevens, J., concurring in part, dissenting in part). Justice Stevens also noted that the majority's speculation about prisoners communicating in codes was unsupported by record evidence and was based on a suggestion in an *amicus curiae* brief. *Id.* at 2271 n.13 (Stevens, J., concurring in part, dissenting in part).

158. *Id.* at 2273 (Stevens, J., concurring in part, dissenting in part). Justice Stevens concluded that the prisoners' correspondence rights should have received constitutional protection. *Id.* (Stevens, J., concurring in part, dissenting in part). In support of his conclusion, Justice Stevens indicated that the record contradicted the majority's conclusion that scanning inmate-to-inmate mail would be unbearable. *Id.* (Stevens, J., concurring in part, dissenting in part). Furthermore, the ban was an excessive response to security concerns and was contrary to a consensus of expert testimony that Justice Stevens suggested was "far more reliable than the speculation to which this Court accords deference." *Id.* (Stevens, J., concurring in part, dissenting in part) (footnote omitted).

159. *Id.* at 2268 (Stevens, J., concurring in part, dissenting in part). The *Turner* Court specifically cited its previous prisoners' rights cases as the origins of the four factors it assembled in its analysis. *Id.* at 2262 (citing *Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Pell v. Procunier*, 417 U.S. 817 (1974)). For a discussion of *Pell*, see *supra* notes 59-66 and accompanying text. For a discussion of *Bell*, see *supra* notes 86-91 and accompanying text. For a discussion of *Jones*, see *supra* notes 75-85 and accompanying text. For a discussion of *Block*, see *supra* notes 93-95 and accompanying text. For a discussion of the four factors applied by the *Turner* majority in its analysis, see *supra* notes 125-44 and accompanying text.

160. *Turner*, 107 S. Ct. at 2261.

161. *Id.* at 2261-62. The Court stated that a reasonableness standard was necessary if prison administrators and not courts were to make the difficult decisions regarding prison operations. *Id.* at 2262 (citing *Jones*, 433 U.S. at 128). Basically, the elements of the reasonableness standard in *Turner* are the same considerations that once constituted unique factors in the analysis of prior cases. See *Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119

It is submitted that a single reasonableness standard, even one such as that articulated in *Turner*, is inadequate to protect prisoners' constitutional rights.¹⁶² Two problems in the application of such a standard preclude meaningful review.

First, as Justice Brennan stated in *O'Lone v. Shabazz*,¹⁶³ the standard is "categorically deferential."¹⁶⁴ Thus, after *Turner*, it appears that whenever a reviewing court finds a logical connection between a prison official's plausible security concern and the challenged regulation, the regulation will be sustained absent overwhelming evidence of its unreasonableness.¹⁶⁵ Institutional security, discipline and rehabilitation can

(1977); *Pell v. Procunier*, 417 U.S. 817 (1974). For a discussion of these cases and the contribution each made to the factors the Court considered in *Turner*, see *supra* notes 59-91 and accompanying text.

162. The foundation of the *Turner* Court's standard was a rational relationship test. See *id.* at 2261. The majority seemingly elevated its standard to an intermediate level of scrutiny by outlining three additional factors which together, on their face at least, indicated that courts were to truly scrutinize challenged regulations. Subsequently, however, the *Turner* Court watered down the standard through the way in which the majority applied it. For a discussion of the four factors of the Court's analysis, see *supra* notes 125-32 and accompanying text. For a criticism of the way in which the *Turner* Court's factors are applied, see *infra* notes 159-88 and accompanying text. For a discussion of intermediate and minimal levels of scrutiny, see *supra* notes 21-26 and accompanying text.

Furthermore, it is submitted that the *Turner* Court's use of a single standard of review for all fundamental rights challenges does not adequately take into account the degree of deprivation imposed by a regulation. For a discussion of an alternative standard of review which does take cognizance of the degree of deprivation incident to a regulation, see *infra* notes 189-205 and accompanying text.

163. 107 S. Ct. 2400 (1987).

164. *Id.* at 2408 (Brennan, J., dissenting). For a discussion of why the *Turner* standard is categorically deferential to prison officials, see *infra* notes 165-69 and accompanying text.

In *O'Lone*, Muslim inmates challenged two prison policies which had the incidental effect of preventing them from attending Jumu'ah, the primary congregational service of their faith. *Id.* at 2402. The *O'Lone* Court applied the *Turner* standard and concluded that the regulations did not offend the inmates' interest in the free exercise of religion despite the fact that the regulation effectively precluded a subgroup of Muslims from attending the religious service held every Friday. *Id.* at 2407 (citing *Turner*, 107 S. Ct. at 2263).

165. 107 S. Ct. at 2267-68 (Stevens, J., concurring in part, dissenting in part). For example, the *Turner* Court accepted speculation by prison officials that allowing correspondence between inmates would lead to gang problems, escapes and the use of secret codes in support of the ban on inmate correspondence. *Id.* at 2263. The Superintendent, however, was unable to offer proof that the total ban on inmate correspondence inhibited escape plots, inmate riots or other subversive activities. *Id.* at 2270 (Stevens, J., concurring in part, dissenting in part). Nonetheless, this lack of proof was not fatal to the prison's case. See *id.* (Stevens, J., concurring in part, dissenting in part); see also *O'Lone*, 107 S. Ct. 2400 (prison policies rescheduling certain Muslim inmates to outside work detail and refusing to allow these inmates to return to their buildings upheld despite fact that policies deprived inmates of opportunity to participate in weekly, central religious service of their faith and notwithstanding prison's his-

easily be cited in support of virtually any regulation and unless there is some strong evidence to suggest that the governmental interest is not legitimate, the court is unlikely to look beyond the face of the stated interest to see if the underlying policy is arbitrary or irrational or if the regulation truly furthers those interests.¹⁶⁶

The reviewing court will also defer to prison officials if another avenue of exercising the right remains open to the inmates.¹⁶⁷ Under the Court's standard, when accommodating a prisoner's right will affect fellow inmates or prison staff, courts are directed to be particularly deferential to prison officials.¹⁶⁸ Finally, the absence of ready alternatives is merely evidence of the reasonableness of the regulation and unless prisoners can demonstrate an alternative that fully accommodates the right, the court will not inquire further.¹⁶⁹

tory of accommodating Muslim inmates prior to adoption of these policies); *Deer v. Carlson*, 831 F.2d 1525 (9th Cir. 1987) (prison officials' opinion that inspection of headgear would lead to confrontations between inmates and personnel provided sufficient basis for court to conclude prohibition of all headgear in dining hall, even headgear worn for religious reasons, did not violate inmates' constitutional right to free exercise of religion); *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987) (prison official's assertion regarding security concerns was sufficient to uphold policy of rejecting unprivileged mail and restricting inmate's access to hardbound legal volumes under *Turner* standard); *Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987) (prison officials' concerns that if Muslim inmates were allowed to lead congregational service, security might be jeopardized due to possible doctrinal conflicts or use of meetings to coordinate subversive activity are legitimate and support practice of canceling prayer services when Muslim chaplain was unavailable).

166. *See Turner*, 107 S. Ct. at 2267-68 (Stevens, J., concurring in part, dissenting in part). Even though Superintendent Turner testified that it would be possible to screen the mail of inmates suspected of gang activities, the Court did not consider this as evidence that the total ban was an exaggerated response. *Id.* at 2270 n.5 (Stevens, J., concurring in part, dissenting in part); *see also O'Lone*, 107 S. Ct. at 2411-12 (*O'Lone* majority deferred to prison officials' mere assertions that accommodating inmates' wishes to attend religious services was not feasible despite evidence that inmate participation was compatible with the concerns of prison administration and that prison previously had accommodated Muslim inmates over period of five years without incident).

167. *Turner*, 107 S. Ct. at 2262. It is suggested by the *Turner* decision that this alternative avenue of expression need not necessarily be a meaningful one. *See id.* at 2272 (Stevens, J., concurring in part, dissenting in part). For example, the *Turner* majority implied that the ability of a prisoner to write to friends not in prison provided an adequate, substitute means of expression given the prohibition against writing other inmates. *See id.* at 2263.

168. *Id.* at 2262. The *Turner* Court itself noted that this consideration was but a straw man when it pointed out that, "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramification on the liberty of others or on the use of the prison's limited resources." *Id.* It is the rare situation where accommodating a prisoner's right will not somehow impact others in a system possessing finite resources. It is submitted that this factor adds little to the degree of scrutiny courts will apply under this reasonableness standard.

169. *Id.* Prison officials do not bear the burden of proving that alternative methods of accommodating prisoners' constitutional rights are unworkable. *Id.*

It is submitted that the excessive role of deference in the *Turner* Court's reasonableness standard reduces the arguably intermediate standard of review to that of a rational relationship standard¹⁷⁰ affording minimal scrutiny of challenged regulations which is reminiscent of the Supreme Court's earlier hands-off approach to prisoners' complaints.¹⁷¹ However, it is also submitted that a minimal amount of scrutiny is not necessarily inappropriate in all cases. Sometimes, courts should defer to the judgment of prison administrators. One instance is when a regulation precludes the inmates from engaging in a presumptively dangerous activity.¹⁷² Here, deference should be nearly absolute, but not categorical.¹⁷³ Another instance is when prison regulations work limited deprivations on prisoners' rights by merely restricting the means, time, place or manner of the exercise of a right.¹⁷⁴ Here, deference should be wide-ranging.¹⁷⁵

It is submitted that there exists a third instance in which deference is inappropriate and "professional judgment must . . . yield to constitutional mandate."¹⁷⁶ This situation arises where the activity involved is not presumptively dangerous, and a regulation effectively deprives,

Rather, the burden is on the prisoner: "But if an inmate . . . can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.*

170. For a discussion of why the *Turner* standard as outlined resembles an intermediate level of scrutiny, see *supra* note 135 and accompanying text.

171. Whereas before, under the hands-off doctrine, courts failed to protect prisoners' rights by refusing jurisdiction over their complaints, under the new hands-on-but-highly-deferential doctrine, courts fail to protect prisoners' rights by declining to engage in meaningful review of their complaints. Berger, *supra* note 27, at 20. In his article, Professor Berger states:

Rather than justifying the denial of jurisdiction in prisoners' rights cases, however, the Court now accepts jurisdiction but uses due deference as a principle upon which to base its affirmance of the correctional administrators' decision.

....

The result is a policy of deference dramatically different from the normal respect accorded by the courts to administrative agency determinations. The Supreme Court's effective stance has been not only a reluctance to reverse administrative decisions, but rather the grant of virtually unreviewable discretion to correctional officials on questions involving the constitutional rights of inmates.

Id. (footnotes omitted). For a discussion of the hands-off approach to prisoners' complaints, see *supra* notes 27-39 and accompanying text.

172. See *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985).

173. *Id.* For a discussion of the first branch of the *Abdul Wali* standard, see *supra* notes 102-04 and accompanying text.

174. *Abdul Wali*, 754 F.2d at 1033.

175. *Id.* For a discussion of the second branch of the *Abdul Wali* standard, see *supra* notes 105-08 and accompanying text.

176. *Abdul Wali*, 754 F.2d at 1033.

rather than limits, the exercise of a prisoner's rights.¹⁷⁷ The standard as enumerated by the *Turner* Court, however, would be applied uniformly to these very different instances and thus a major flaw of the standard is its failure to discriminate among degrees of deprivation.¹⁷⁸ The Court will apply the same standard whether a regulation, in effect, totally denies the exercise of a fundamental right or merely restricts its exercise.¹⁷⁹ For example, the *Turner* standard of review would apply uniformly to a regulation that restricts use of a prison library to certain hours as well as one that prevents inmates from reading at all.¹⁸⁰ Although the Court's standard indirectly addresses the degree of deprivation by considering available alternatives, counsel and the judiciary will be unlikely to accord this factor the importance it would otherwise receive under a heightened scrutiny analysis.¹⁸¹

Likewise, the absence of ready alternatives to accommodate prisoners' rights is a factor in the reasonableness analysis rather than a basis

177. *Id.* For a discussion of the third branch of the *Abdul Wali* standard, see *supra* notes 109-10 and accompanying text.

178. See *Turner*, 107 S. Ct. at 2261 (categorizing regulations as imposing mere time, place or manner restrictions or as limiting presumptively dangerous activities is simply conclusion about reasonableness of regulation in relation to proffered security concerns and as such is "tenuous basis for creating a hierarchy of standards of review."); *O'Lone*, 107 S. Ct. at 2404 n.** (rejecting contention that heightened scrutiny is warranted when regulation prohibits, rather than merely limits, exercise of constitutional right); see also *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 333 (3d Cir. 1987) (citing *Turner*, 107 S. Ct. at 2261; *O'Lone*, 107 S. Ct. at 2404 n.**) ("[T]he Supreme Court has recently instructed that, whether the restriction be partial or complete, a reviewing court must apply a uniform standard of review.").

179. See *O'Lone*, 107 S. Ct. at 2404 n.**. Justice Brennan criticized the use of a single standard for all prisoner challenges and noted that to the extent that incarceration is intended to inculcate a respect for social and legal norms, a requirement that prison officials demonstrate the need for total deprivations of prisoners' rights would be consistent with this end. *Id.* at 2409-10 (Brennan, J., dissenting).

180. *Id.* at 2408 (Brennan, J., dissenting). In *Turner*, for instance, the Court applied the reasonableness standard to the total ban on inmate-to-inmate correspondence as well as to a regulation that severely restricted inmate marriages but did not totally ban them. *Turner*, 107 S. Ct. at 2262-63. For a discussion of *Turner*, see *supra* notes 111-58 and accompanying text.

181. *O'Lone*, 107 S. Ct. at 2408-09 (Brennan, J., dissenting). Justice Brennan noted that by employing different levels of scrutiny, courts signal that when fundamental rights, interests or suspect classes are involved, official power must justify itself in a way that otherwise it need not. *Id.* at 2409 (Brennan, J., dissenting). Justice Brennan also commented that "[a] relatively strict standard of review is a signal that a decree prohibiting a political demonstration on the basis of the participants' political beliefs is of more serious concern, and therefore will be scrutinized more closely, than a rule limiting the number of demonstrations that may take place downtown at noon." *Id.* at 2409 (Brennan, J., dissenting). As it stands this consideration is an "elastic" and easily satisfied factor effectively providing scrutiny only in situations of total deprivation of fundamental rights. *Id.* (Brennan, J., dissenting).

for applying heightened scrutiny.¹⁸² Thus, the absence of alternatives is merely evidence of the reasonableness of a regulation.¹⁸³ Here, the burden is on the inmate to demonstrate an alternative that fully accommodates the right in question at a *de minimis* expense to governmental interests.¹⁸⁴ However, as to prison regulations, the very same individuals who make the rules possess the evidence essential to showing the superiority of a given deprivation over other alternatives.¹⁸⁵ It is therefore submitted that inmates themselves have little chance of suggesting an alternative that could withstand the presumption of validity that accompanies a court's deference to prison officials' professional determination that the alternative would impose more than a *de minimis* cost.¹⁸⁶ Placing the burden on the inmates, therefore, virtually ensures their failure, especially since almost any change in the established method of operating to accommodate the right will be at some cost to governmental interests.¹⁸⁷

182. *Turner*, 107 S. Ct. at 2262.

183. *Id.* Conversely, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to security concerns. *Id.*

184. *Id.*

185. *O'Lone*, 107 S. Ct. at 2410 (Brennan, J., dissenting). Justice Brennan stated that it was only fair that prison officials be held to a stringent standard of review in such cases. *Id.* (Brennan, J., dissenting).

186. *See Turner*, 107 S. Ct. at 2262. The *Turner* Court noted that where accommodation of a prisoner's right would have a significant "ripple effect" on other inmates and prison staff, courts should be especially deferential. *Id.* As noted above, virtually any accommodation of prisoners' rights will impact upon the liberty and safety of other inmates and corrections personnel and may have an effect felt throughout other prisons as in the case of inmate-to-inmate correspondence. *See O'Lone* 107 S. Ct. at 2412-14 (Brennan, J., dissenting). For a discussion of the potential for a "ripple effect" amongst multiple correctional institutions, see *supra* notes 138-40 and accompanying text.

187. This consideration ties into that part of the *Turner* Court's analysis regarding the impact that accommodation of the constitutional right will have on prison resources. *Turner*, 107 S. Ct. at 2262. Notably, once a change is shown to be at some cost, in staff time, for example, it will defeat both the requirement of a *de minimis* cost and the requirement that the accommodation not burden prison resources. *See O'Lone*, 107 S. Ct. at 2406-07, 2411-12 (Brennan, J., dissenting); *Turner*, 107 S. Ct. at 2263-64, 2272-73 (Stevens, J., concurring in part, dissenting in part); see also *Deer v. Carlson*, 831 F.2d 1525, 1529 (9th Cir. 1987) (despite concession that suggested inspection would have *de minimis* effect on staff and would alleviate officials' legitimate safety concern, alternative was rejected on speculation that inspection might cause confrontations between guards and prisoners). It appears that to the extent that any accommodation will require some reallocation of finite resources, the prison necessarily will prevail. *O'Lone*, 107 S. Ct. at 2412-13 (Brennan, J., dissenting); see also *Hadi v. Horn*, 830 F.2d 779, 786 (7th Cir. 1987) (if prison allowed Muslim inmates to lead religious services, privilege would have to be extended to other religions thus compounding security problems and increasing concomitant demands on staff). *But see Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 341 (3d Cir. 1987) (funding nontherapeutic abortions and transporting and escorting pregnant inmates to medical facility does not burden prison's finite resources any more than current practice of providing inmates with all necessary pre- and post-natal

The *Turner* Court's excessively deferential reasonableness standard provides the barest scrutiny of restrictions upon prisoners' rights and essentially validates officials' action on the basis of assertions regarding possible administrative and security problems rather than on the basis of any proof that the regulations are necessary to further governmental interests.¹⁸⁸

It is suggested that prisoners' rights would be better protected, especially where the practical effect of a regulation is a total or nearly total abridgement of rights, under a standard such as that outlined by the Second Circuit in *Abdul Wali v. Coughlin*.¹⁸⁹ Under the *Abdul Wali* standard, analysis proceeds along one of three branches depending on the nature of the right being asserted by prisoners, the type of activity in which they seek to engage and whether the challenged regulation merely limits or totally abridges the exercise of the particular rights.¹⁹⁰ A large percentage of challenges to prison regulations will fall under the first

care). This accommodation will divert resources from other penological objectives in which case the courts are directed to defer to officials' expertise as to the most efficient use of these resources. *Turner*, 107 S. Ct. at 2262; see also *McCabe v. Arave*, 827 F.2d 634, 637 (9th Cir. 1987) (prison officials' determination that allowing group religious activities by close-custody inmates would burden prison resources and increase security risk is entitled to respect and deference).

188. *Turner*, 107 S. Ct. at 2268 n.1 (Stevens, J., concurring in part, dissenting in part).

189. 754 F.2d 1015 (2d Cir. 1985). Justice Stevens cited with approval the standard applied by the Second Circuit in *Abdul Wali v. Coughlin*. *Turner*, 107 S. Ct. at 2268 n.1 (Stevens, J., concurring in part, dissenting in part). Justice Brennan also endorsed the *Abdul Wali* standard in *O'Lone v. Shabazz*. *Id.* at 2409 (Brennan, J., dissenting). For a discussion of the *Abdul Wali* standard, see *supra* notes 100-10 and accompanying text and *infra* notes 190-204 and accompanying text.

190. *Abdul Wali*, 754 F.2d at 1033. The first branch of the standard addresses rights that are inherently inconsistent with incarceration and, therefore, are not retained by prisoners. *Id.* Under these circumstances, no right exists to be infringed and judicial deference should be nearly absolute. *Id.*

The second branch of the standard applies in three situations: (1) when the exercise of the retained right is presumptively dangerous; (2) when prison regulations merely define the time, place or manner in which a right may be exercised; and (3) when regulations limit one of the available means of enjoying a right. *Id.* In cases falling under the second branch, a court must afford officials wide-ranging deference. *Id.*

The third branch operates where the activity is not presumptively dangerous and the regulation totally abridges rather than simply limits the exercise of a fundamental right. *Id.* In this situation, prison officials must prove that the regulation furthers an important government interest and that it infringes no more than is necessary to further the governmental interest. *Id.*

In contrast, the *Turner* standard applies uniformly without regard to whether the regulation totally abridges or merely limits the exercise of a fundamental right. See *Turner*, 107 S. Ct. at 2262. For a discussion of the uniform use of the *Turner* standard, see *supra* notes 178-81 and accompanying text. For a fuller discussion of the *Abdul Wali* standard, see *supra* notes 100-10 and accompanying text. For a discussion of the third prong of the *Abdul Wali* standard, see *infra* notes 109-10 and accompanying text.

two branches of the standard¹⁹¹ and are not a significant departure from the *Turner* Court's deferential standard.¹⁹² However, analysis under the third branch of the *Abdul Wali* standard differs fundamentally from the *Turner* analysis in four significant respects that together provide greater protection for prisoners' constitutional rights.¹⁹³

191. For a discussion of the first two branches of the *Abdul Wali* standard, see *supra* notes 101-08 and accompanying text.

192. *O'Lone*, 107 S. Ct. at 2409 (Brennan, J., dissenting). It is submitted that, although the analysis under the *Abdul Wali* and *Turner* standards of review are somewhat different, the predominant role deference plays in each reduces the standards to a common denominator—essentially, a reasonableness standard of review—for cases falling within branches one and two of the *Abdul Wali* standard. See *id.* at 2409 (Brennan, J., dissenting). To illustrate the similarity of these standards under branch one, assume an inmate, desirous of attending a special religious ceremony held outside the prison, challenged the prison's practice of not allowing prisoners to leave the facility except for court appearances and medical emergencies. Under an *Abdul Wali* analysis, once the reviewing court determined that the right to travel and move about from place to place did not inhere within the prison context, its analysis would end in nearly absolute deference to the prison officials. See *Abdul Wali*, 754 F.2d at 1033. In contrast, under *Turner* the reviewing court would determine whether there was a valid rational connection between the practice of only allowing inmates out of the prison for court appearance and medical emergencies and the security and safety concerns that an inmate might escape from his escorts and endanger the public. See *Turner*, 107 S. Ct. at 2262. The court being particularly deferential to prison officials would then consider whether alternative means of exercising religious rights existed within the prison and the significant impact accommodating the inmate would have on inmates not allowed to leave and on the prison resources that would be expended in escorting the inmate. See *id.* Finally, the court would consider whether the inmate could show that this alternative accommodation would impose more than a *de minimis* cost. See *id.*

Similarly, the second branch of the *Abdul Wali* standard does not differ significantly from the *Turner* standard. Assume for comparison of the two standards that the inmate wishes to attend a unique Native American religious ceremony held in an area of the prison that is less secure than the unit in which the inmate is housed. See *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987) (involving such ceremony). Assume further that the service involves the use of an axe to chop wood for a fire, red hot stones to heat a special room in which the ceremony is conducted and a pitchfork to carry the hot stones from the fire into the room. *Id.* Prison officials assert security concerns in allowing these maximum security inmates to take part in the ceremony. *Id.* at 566-67. In such a situation, the underlying fundamental right—the free exercise of religion—in itself, is not presumptively dangerous; however, the particular expression of that right is. Under the *Abdul Wali* standard, once the reviewing court determined that allowing maximum security inmates to participate in the religious ceremony was presumptively dangerous, the court would grant officials wide latitude. That the inmates are precluded this exercise of their fundamental right does not affect the result. Similarly, under the *Turner* standard, the court would uphold the prohibition through application of the four factors heavily emphasizing deference to prison officials. See *Turner*, 107 S. Ct. at 2262.

Thus, in these types of cases, like the *Turner* standard, the *Abdul Wali* standard acknowledges that in many cases it is inappropriate for the court to substitute its judgment for that of prison officials. *O'Lone*, 107 S. Ct. at 2409 (Brennan, J., dissenting).

193. The third branch of the *Abdul Wali* standard applies when the activity

The first significant difference between the standards is that under *Abdul Wali* if a court finds that the challenged regulation effectively "works a total deprivation (as opposed to a mere limitation) on the exercise of [a] right" the exercise of which is not presumptively dangerous, this triggers a higher degree of judicial scrutiny with a necessarily reduced emphasis on deference.¹⁹⁴ Contrast the *Turner* standard under which the degree of deprivation is merely another factor in the overall reasonableness analysis rather than a basis for applying heightened scrutiny.¹⁹⁵ Furthermore, as shown by the *Turner* majority's analysis of the correspondence regulation, deference to officials regarding the availability of alternative means of exercising the right can obscure the inadequacy of available alternatives.¹⁹⁶

The second point of contrast is upon who bears the burden of proof. Under the *Abdul Wali* standard, prison officials bear the burden of showing that the regulation furthered an important governmental interest and that the regulation infringes no more than is necessary to further that interest.¹⁹⁷ In *Turner*, however, inmates bear the burden of proving the unreasonableness of the regulation. Even if an inmate is able to suggest an alternative that accommodates the right, this is merely evidence that the regulation is unreasonable.¹⁹⁸

The third difference is that under *Abdul Wali* prison officials must actually show that the challenged regulation furthers an important, legitimate interest in security, discipline or rehabilitation.¹⁹⁹ The *Turner* standard requires far less: the court need only find a "logical" or "valid, rational connection" between the regulation and the government interest.²⁰⁰ As Justice Stevens poignantly noted: "Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners."²⁰¹

The final difference is that the *Abdul Wali* standard requires prison officials to show that the regulation imposes no greater restriction on the exercise of a right than is necessary to further the governmental in-

in which the inmate seeks to engage is not presumptively dangerous and the regulation on its face, or in effect, totally abridges the exercise of a fundamental right. *Abdul Wali*, 754 F.2d at 1033.

194. See *id.*

195. See *Turner*, 107 S. Ct. at 2262.

196. See *id.* at 2263-64. For a criticism of the *Turner* Court's analysis of available alternatives, see *supra* notes 167-69 and accompanying text.

197. See *Abdul Wali*, 754 F.2d at 1033.

198. See *Turner*, 107 S. Ct. at 2262; see also *O'Lone*, 107 S. Ct. at 2412-14 (inmates' suggestions demonstrating arguably workable ways to allow them to attend religious service not sufficient to support finding regulation unreasonable).

199. See *Abdul Wali*, 754 F.2d at 1033.

200. See *Turner*, 107 S. Ct. at 2262 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

201. *Id.* at 2268 (Stevens, J., concurring in part, dissenting in part).

terest.²⁰² *Turner* only considers the existence of "easy alternatives" as evidence that the regulation is unreasonable.²⁰³

These differences, it is submitted, are not insignificant, but greatly impact the likelihood of a successful challenge to a prison regulation. Furthermore, while both the *Abdul Wali* and *Turner* standards, on their face, are couched in language and factors seemingly indicating intermediate levels of scrutiny, the *Abdul Wali* standard more consistently and more predictably provides protection of prisoners' rights. It is submitted that the heavy emphasis on deference in the *Turner* standard makes the factors so malleable that in the hands of one court the chameleon-like standard will operate like a rational basis test, while in the hands of another court it will operate like an intermediate level of review depending on the nature of the right asserted, the type of activity in which the inmates seek to engage and the degree of deprivation²⁰⁴—factors predictably built into the three branches of the *Abdul Wali* standard. Therefore, it is submitted that only the *Abdul Wali* standard consistently and predictably provides meaningful constitutional review over the exercise

202. See *Abdul Wali*, 754 F.2d at 1033.

203. See *Turner*, 107 S. Ct. at 2262.

204. Arguably, the Supreme Court's application of the *Turner* standard to the correspondence regulation, was not wholly consistent, and less stringent than the Court's application of the standard to the marriage regulation. See *id.* at 2274 (Stevens, J., concurring in part, dissenting in part). For a criticism of the majority's inconsistent application of the standard, see *supra* notes 154-58 and accompanying text.

The ways in which the Courts of Appeals have applied the *Turner* standard further illustrate how the standard can be manipulated to achieve levels of review between minimum rationality and intermediate scrutiny. Compare *Martin v. Brewer*, 830 F.2d 76, 78 (7th Cir. 1987) (citing *Turner*, but upholding regulation requiring attorneys to stamp mail with special notation on ground that "requirement is easy to comply with" and remanding with respect to mail from public officials); *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987) (citing *Turner*, but upholding restriction on access to religious ceremony on finding of valid, rational connection between restriction and security concerns and that restriction was content-neutral) and *Kent v. Johnson*, 821 F.2d 1220, 1230 (6th Cir. 1987) (*pro se* complaint held sufficient on reconsideration to withstand motion to dismiss even though under rational relationship standard of *Turner* court need merely determine whether prison regulation is reasonably related to legitimate penological interests) with *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 338-43 (3d Cir. 1987) (court vigorously scrutinized and rejected asserted penological interests, applying *Turner* standard); *Deer v. Carlson*, 831 F.2d 1525, 1528-29 (9th Cir. 1987) (after discussing availability of alternatives, inmates' suggested accommodation and effect it would have on other inmates and prison personnel, court concluded that there was valid, rational connection between regulation prohibiting inmates from wearing headgear in dining hall and concerns for cleanliness, security and safety) and *Rodriguez v. James*, 823 F.2d 8, 12 (2d Cir. 1987) (court found valid connection between regulation requiring inspection of inmates' business mail and interest in preventing inmates from defrauding merchants or incurring excessive debt, that regulation did not prevent communication and that no alternative could accommodate inmates at *de minimis* cost).

of official power that deprives prisoners of their retained rights.²⁰⁵ Thus, it is further submitted that by employing a hierarchy of standards of review, courts could give prison officials due deference and respect, yet protect prisoners' fundamental rights.

IV. CONCLUSION

Prisoners' constitutional rights have only recently been recognized as deserving protection. To the extent that the exercise of prisoners' retained rights conflicts with penological objectives of security, discipline and rehabilitation, some accommodation must be reached. Thus, the Supreme Court has been challenged to determine how best to protect those rights which prisoners retain. To this end, the Supreme Court, in *Turner v. Safley*, formulated a standard of review for regulations challenged as impinging upon prisoners' rights. The standard, however, is inadequate to the task.

Although the *Turner* standard appears to provide an intermediate level of scrutiny, the standard's heavy emphasis on deference robs it of most of its bite. While the unique circumstances of confinement may justify the Supreme Court's highly deferential posture toward the decisions of prison administrators in certain instances, it is submitted that such a stance is not appropriate in all cases. Yet, the *Turner* standard is to be applied uniformly to review the whole range of challenges without regard to whether the regulation at issue merely limits or totally abridges the exercise of a right or whether the activity in which the inmate seeks to engage is dangerous or harmless. In the name of deference, the *Turner* standard largely ignores these considerations to the detriment of prisoners' rights. Whereas the Supreme Court's standard seems to be forcing a fit in situations where "one size does not fit all," the *Abdul Wali* standard provides varying levels of scrutiny sensitive to the circumstances of each particular challenge. It is submitted that such a standard is better suited to the task of accommodating both prisoners' rights and penological interests.

Lorijean Golichowski Oei

205. For a discussion of the rights retained by prisoners, see *supra* notes 41-43 and accompanying text.